Supreme Court, U.S.
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No. 05-___

IN THE

Supreme Court of the United States

Leonard A. Pelullo,
Petitioner,

v.

United States.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether and in what circumstances the prosecution's failure to disclose relevant evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), is excused by the defendant's own ability to uncover the evidence through the exercise of "due diligence."

2. Whether, assuming that such a "due diligence" obligation exists, a defendant fails to exercise sufficient diligence when the government misleads him into not pursuing the evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leonard A. Pelullo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion (Pet. App. 1a-44a) is published at 399 F.3d 197. The district court's judgment and opinion (Pet. App. 45a-87a) are unpublished.

JURISDICTION

The Third Circuit denied rehearing and rehearing en banc on March 24, 2005. See Pet. App. 87a. Justice Souter subsequently extended the time to file this Petition to and including August 19, 2005. App. 04A1041. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment provides in relevant part: "[N]or shall any person * * * be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was convicted on charges arising from an alleged embezzlement scheme. The district court subsequently concluded, based on extensive factfinding, that the government had committed a serious violation of its duty under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose relevant evidence to the defense. Prosecutors, the district court found, repeatedly misled petitioner and the court into believing that a cache of documents in the government's possession contained no relevant exculpatory evidence. In fact, the court found, many of those documents seriously undercut the credibility of crucial testimony offered by government witnesses at trial. The district court further found that absent the prosecutors' false representations, petitioner's counsel would have ob-

tained the documents from the government and, armed with the information contained in those documents, would have been able to respond convincingly to the trial testimony. The district court held that a new trial was accordingly required. On appeal, the Third Circuit did not disturb the district court's findings that the documents had not been disclosed to petitioner and that they contained important exculpatory evidence. It nonetheless denied petitioner a retrial on the remarkable ground that petitioner had a duty to discover the evidence in the government's possession himself, notwithstanding the government's repeated misrepresentations that the documents in its possession contained no relevant evidence.

1. During the early and mid-1990s, the government engaged in an investigation of petitioner Leonard Pelullo in the Middle District of Florida. In 1991, as part of that investigation, it seized essentially all of the documents relating to approximately twenty different corporate entities controlled by petitioner. The next year, the government returned some of those documents (weighing some seventy-five thousand pounds) in a disorganized fashion. However, the government retained a very large cache – 160 boxes and thirty-six file cabinets – of the documents. Significantly, the government declined to provide petitioner with an index that differentiated the documents it was retaining from those it had returned.[1]

2. In 1994, while still in possession of the Florida documents, the government indicted petitioner in the District of New Jersey on charges arising from a separate investigation of an alleged scheme by petitioner to misappropriate the pension funds of a printing company, the Compton Press.[2] This petition arises from that New Jersey prosecution, challenging

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[1] The government eventually voluntarily dismissed the Florida charges.

[2] The government charged petitioner with fifty-four counts of conspiracy, embezzlement, and money laundering.

the government's failure to turn over to petitioner, as required by *Brady*, relevant documents retained from the Florida seizure.

During the course of the New Jersey proceedings, prosecutors disclosed to petitioner six specific boxes of documents retained from the 1991 seizure. The rest, the government repeatedly advised petitioner and the district court, were relevant *only* to the separate Florida investigation, and *not* to the New Jersey proceedings. See Pet. App. 59a. The government made those representations not only prior to trial but also, most importantly for present purposes, both on the eve of and during the trial itself. Immediately prior to trial, petitioner's counsel indicated his willingness to send a representative to review materials in the Florida documents. The AUSA prosecuting the case in New Jersey, however, advised petitioner's counsel "that he had been *assured* by his agents and the Florida prosecutor that there were *no documents* in Jacksonville pertaining to Compton Press or the charges against Mr. Pelullo in this district and that [counsel] *should not bother* to go to Jacksonville." *Id.* at 15a (emphases added). In response to another specific query from petitioner's counsel, the AUSA "responded that he had spoken to the prosecutor in the Middle District of Florida and had been told that the prosecutors in that district were *not in possession of any documents* relevant to Compton Press or the charges against Mr. Pelullo in this district." *Ibid.* (emphasis added).

During trial, the district court expressly sought to verify that the prosecutor was directing representatives in Florida to undertake "an exhaustive search" of the documents for exculpatory evidence. The prosecutor responded, "Yes, I am." C.A. J.A. 385. The government later advised petitioner's counsel that "[t]he United States is not aware of any additional * * * *Brady* or *Giglio* material." *Id.* at 4040-41. In response to further inquiries regarding disclosures of the Florida documents, the government represented not only that "[a] thorough search has been made" but also that "[a] thorough search is continuing." *Id.* at 2618-19. The government did

not disclose any other Florida documents until after the trial. Nor, critically, did it retreat from its representations that it had reviewed those documents and they contained no evidence relevant to the New Jersey proceedings.

3. At trial, the prosecution's strategy was to put on witness testimony that petitioner had undertaken particular transactions relating to the Compton Press pension funds without authorization and for improper purposes. Petitioner learned of this testimony only at the trial: his indictment did not set forth the government's proof, but instead stated the charges in sparing fashion. (The entire superseding indictment, setting forth all fifty-four counts, spans only a meager eighteen pages. C.A. J.A. 3716-33.)

As the district court later found, petitioner would have been able to show that much of this testimony was false if the government had complied with its *Brady* obligations and turned over exculpatory documents retained from the Florida seizure. As discussed further *infra*, government witnesses asserted that petitioner had secured financial control over an entity rather than providing it with a "bridge loan"; that petitioner had siphoned cash from an entity he had taken over with Compton Press funds; and that petitioner had withdrawn more funds from the Compton Press trusts than he had deposited. The district court later found that those statements, though central to the government's case, were – unbeknownst to the jury – utterly untrue or at the very least highly dubious. The court further found that had petitioner's counsel reviewed the Florida files, he would easily have obtained a substantial amount of evidence that demonstrated the many inaccuracies in the testimony put on by the government. Yet the prosecutors' repeated assurances to petitioner and to the court that the documents held by the government in Florida contained no relevant evidence led petitioner's counsel to believe – erroneously – that there was no need to review those files during the trial. Pet. App. 59a.

Petitioner was convicted on all counts and sentenced to seventeen-and-a-half years in prison. His conviction was affirmed on appeal (185 F.3d 863 (CA3 1999) (table)), and this Court denied certiorari (528 U.S. 1081 (2000)).

4. After trial, petitioner filed a timely motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. He alleged that newly discovered evidence demonstrated that the government had violated its duty under *Brady* to produce exculpatory evidence and its related duty under *Giglio* v. *United States*, 405 U.S. 150 (1972), to produce evidence that impeached its witnesses. Specifically, petitioner explained that, after trial, a representative of his counsel had examined the Florida documents and discovered, contrary to the government's repeated representations, that those files included numerous exculpatory and impeaching documents.

The same district judge who had overseen petitioner's trial (Debevoise, J.) received extensive briefing, reviewed numerous exhibits, and conducted a lengthy hearing. See Pet. App. 46a-87a. On the basis of this evidence, the district court made detailed findings that numerous documents held by the government in Florida were directly "exonerating and/or impeaching" of crucial testimony that the government's witnesses had offered about the "critical issue" of "[petitioner]'s intent." *Id.* at 60a, 59a. Several examples from the district court's detailed ruling illustrate the significance of the material withheld by the government:

- A government witness testified that, contrary to petitioner's representations that he had merely provided a "bridge loan" to the travel agency, petitioner had actually made an investment that gave him majority control of the agency in order to misappropriate its accounts. *Id.* at 61a. The Florida materials included numerous documents demonstrating that the funds had constituted a loan. *Ibid.*

- A government witness testified that petitioner had looted funds from the travel agency. *Id.* at 61-62a. The Florida documents included proof that petitioner had actually pro-

vided funds to the travel agency that exceeded by hundreds of thousands of dollars what he had been repaid. *Ibid.*

- A government witness testified that petitioner specifically ordered the withdrawal of $200,000 in funds from the travel agency for improper purposes. *Id.* at 63a. The Florida documents demonstrated that, in fact, the transfer had been ordered by the agency's president. *Ibid.*

- Government witnesses testified that petitioner had directed the withdrawal of more funds from the Compton Press funds than he contributed. *Id.* at 63a-64a. The Florida documents included proof that petitioner's investments exceeded any withdrawals by a large amount, evidence that the district court found "bears significantly on the testimony" of the government's witnesses. *Ibid.*

- The government also asserted that petitioner had misappropriated the proceeds of an insurance contract. One government witness supported that theory by testifying that he and petitioner met and discussed those funds the day they were deposited into Compton Press's bank account. In fact, withheld documents demonstrated that such a meeting could not have occurred because petitioner was in another state at the time. *Id.* at 65a-66a.

- The government also failed to disclose to petitioner an important piece of evidence that was neither among the Florida documents nor created by one of his own companies. A government witness testified at trial that his signature had been forged on various documents. The government failed to disclose, however, a handwriting report that the signatures were genuine. The district court specifically recognized that the report "was a pretty persuasive piece of evidence" (C.A. J.A. 3936) that "would have cast doubt upon important testimony of a key witness" (Pet. App. 67a) and indeed "tend[ed] to show that [the witness] lied at trial" (*id.* at 66a). The government attorney prosecuting the case, in response to petitioner's *Brady* claim, acknowledged that he "was aware of"

the report but had nonetheless failed to disclose it. C.A. J.A. 3937.

Citing these and other examples, the district court found "a mass of documentary and other evidence which seriously undermines the testimony of a number of the Government witnesses." C.A. J.A. 3998. The court concluded that the government had violated petitioner's constitutional rights by repeatedly misrepresenting to petitioner, including at trial, that it did not hold relevant evidence in Florida. As the court explained, even if a defendant is otherwise ordinarily required to uncover exculpatory evidence himself, petitioner's "assigned counsel and, shortly before trial, his retained counsel were faced with the practical problem of an impending trial and were entitled to rely on the government's assurances that it had reviewed the warehouse documents and that there was no relevant material there other than that which was contained in the six boxes" returned to petitioner. Pet. App. 60a.

The district court found that the government's misconduct was not excused by the government's offer, made before it informed petitioner of its evidence, to allow petitioner to photocopy the massive cache of Florida documents. Although the documents were ostensibly available, the government's offer was effectively negated by the government's insistence that petitioner pay more than $50,000 in photocopying costs he could not afford and – more importantly – by its repeated statements that the documents contained no relevant evidence. Pet. App. 59a-60a; Pet. C.A. Br. 45 n.10. See also C.A. J.A. 3930 ("THE COURT: I recall time and time again, you're [sic] assuring the defense and me that you had gotten all the relevant documents from the Florida warehouse.").

On that basis, the district court found "such a serious violation of the government's *Brady* obligations that defendant's motion for a new trial must be granted." Pet. App. 57a.

5. On appeal, the Third Circuit reversed. That court viewed the case as arising "at the intersection between two particular branches of the *Brady* doctrine": the government's

duty not to mislead the defendant about whether its files contain exculpatory evidence and the Third Circuit's broad rule that a *Brady* violation is excused whenever the defendant could have uncovered the evidence himself through due diligence. Pet. App. 24a. The Third Circuit reconciled this "intersection" in favor of the latter principle, holding that even repeated misrepresentations by the government about the contents of various documents in its possession are excused so long as the government makes the documents available to the defendant, who could discover their actual contents on his own. *Id.* at 30a.

The Third Circuit set forth as the touchstone for its analysis the principle, "well-established" in the precedent of that court, "that 'the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.'" Pet. App. 4a (quoting *United States* v. *Starusko*, 729 F.2d 256, 272 (CA3 1984)). Applying that standard, the Third Circuit held that the government's offer to make the Florida documents available to petitioner for copying imposed on petitioner a duty to investigate those documents himself, regardless of what the government represented about their contents. "*Brady* and its progeny permit the government to make information within its control available for inspection by the defense, and impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed." *Id.* at 23a. "[T]he government in this case made the [Florida] documents available to the defense, without specifying any particular documents that were helpful to the defense, something *Brady* does not obligate it to do. In such circumstances, the burden is on the defendant to exercise reasonable diligence." *Id.* at 24a.

Critically, the court of appeals concluded that the government's offer to make the Florida documents available for copying excused it from any responsibility for its repeated misstatements – before and during trial – that the documents

were irrelevant. "[D]efense knowledge of, or access to, purportedly exculpatory material is potentially fatal to a *Brady* claim, *even where there might be some showing of governmental impropriety*." Pet. App. 29a (emphasis added). "The fact of the matter is that the government's post-1996 representations [i.e., those on the eve of and during the trial] did not eliminate its previous offers to make the warehouse documents available to the defense, and in no way absolved the defense of its failure to exercise due diligence during the many months between indictment and trial." *Id.* at 27a.

With respect to the critical misstatements on the eve of and during the trial, the court of appeals thought that "there could not be any genuine reliance by Pelullo on the government's statements, as there was no realistic opportunity for [Pelullo's counsel] to review the warehouse documents" during that period. Pet. App. 27a. It reached that conclusion despite simultaneously remarking upon "*the ease* with which Pelullo discovered the relevant warehouse documents after trial" (*id.* at 28a (emphasis added)) once he learned of the testimony of the government's witnesses. It also opined that "[b]ecause the government in this case *had no knowledge of the exculpatory materials contained in the warehouse documents*, its affirmative representations are far less susceptible of reliance * * *." *Id.* at 29a n.19 (emphasis in original). The court of appeals thus accorded no weight to the government's representations to petitioner and to the district court that it had reviewed the documents and was continuing to do so.

6. After the Third Circuit denied rehearing and rehearing en banc (Pet. App. 88a-89a), this petition followed.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's "Due Diligence" Exception To *Brady* v. *Maryland* Conflicts With Decisions Of Other Circuits.

This case presents the Court with an ideal opportunity to decide an exceedingly important unresolved question about

the government's obligation to disclose evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The courts of appeals are squarely divided over whether the prosecution's failure to disclose evidence under *Brady* may be excused by the defendant's own failure to exercise "diligence" in uncovering that evidence himself.

Both on the eve of and during the trial, prosecutors represented to both petitioner and the court that the documents held by the government in Florida did not contain any relevant evidence. Those representations were false. The district court found that if petitioner's attorneys had reviewed the materials in Florida, they would have discovered a mass of exculpatory evidence that would have seriously undermined the government's case. The Third Circuit nonetheless held that the government's failure to abide by its *Brady* obligations was excused because, under that court's settled precedent, a defendant has a duty to exercise "due diligence" to uncover any exculpatory evidence the government fails to disclose. The court of appeals in this case moreover extended that principle to hold that no *Brady* violation occurs *even if the government represents that no such evidence exists*.

Certiorari is warranted because the Third Circuit's holding widens a three-way circuit conflict. The Third Circuit and three other courts of appeals apply a broad "due diligence" exception to *Brady*. By contrast, three circuits flatly reject such a rule, holding that the prosecution's duty to disclose relevant evidence exists independent of the defendant's ability to secure that evidence himself. Four other circuits adopt a middle ground. While applying the due diligence principle generally, they explicitly reject its application when, as here, the prosecution misleads the defendant into not pursuing the evidence in question or when the evidence only becomes relevant at trial. These courts recognize that "due diligence" cannot reasonably require the defendant to assume the government is lying or to divert its attention from an ongoing trial to conduct an investigation.

There can be no serious dispute that the conflict exists and that it merits this Court's attention. The government acknowledged the existence of a conflict in its briefing below. See Gov't C.A. Reply Br. 31 n.27. Moreover, this Court previously granted certiorari to resolve the conflict in *Strickler* v. *Greene*, 527 U.S. 263 (1999). In *Strickler*, the Fourth Circuit had rejected the defendant's *Brady* claim on the ground that a defendant "cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence," reasoning that the defendant could have secured certain exhibits by making a request before the state court. *Strickler* v. *Pruett*, Nos. 97-29 & -30, 1998 U.S. App. LEXIS 12805, at *27 (June 17, 1998) (quoting *Stockton* v. *Murray*, 41 F.3d 920, 925 (CA4 1994)). Strickler's petition to this Court framed the question presented by his case as "[w]hether the government's duty under the Due Process Clause and *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny, to disclose favorable evidence to the defense is limited by a due diligence exception imposed on defense counsel. If so, is the due diligence exception applicable only to evidence readily available to the defense in a public forum." Pet. for Cert., No. 98-5864, at i.[3] Because *Strickler* did not ultimately decide the issue squarely (see *infra* at 21), it remains ripe for resolution in this case.

1. As the panel indicated, the Third Circuit's acceptance of a "diligent defendant" exception to *Brady* is "well established." Pet. App. 4a (citing *United States* v. *Starusko*, 729 F.2d 256, 262 (CA3 1984)). Three other circuits have also broadly embraced such a rule. *E.g.*, *United States* v. *Cottage*, 307 F.3d 494, 499-500 (CA6 2002); *United States* v. *O'Hara*,

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[3] To address other issues raised by the State in its opposition to certiorari, the Court's Order granting certiorari reframed the question more generally as "Whether the State violated *Brady v. Maryland*, 373 U.S. 83, and its progeny" and directed the parties to brief two other questions as well. 525 U.S. 809 (1998).

301 F.3d 563, 569 (CA7 2002); *United States* v. *Schlei*, 122 F.3d 944, 989 (CA11 1997).

The "due diligence" principle applied by these courts squarely conflicts, however, with decisions of the Ninth, Tenth, and D.C. Circuits. Those courts all expressly reject any such exception to *Brady*. In *Gantt* v. *Roe*, 389 F.3d 908 (CA9 2004) (Kozinski, J.), prosecutors learned that two witnesses did not know a murder victim, information that would have been exculpatory to the defendant. The government disclosed the existence of the witness interviews to the defendant but omitted the fact that the witnesses denied knowing the victim. There, as here, the government argued that its *Brady* obligations were excused by "the defense lawyer's failure to investigate." *Id.* at 912-13. The court of appeals acknowledged that the defense could have discovered the same information, but squarely held that fact was irrelevant:

> While the defense could have been more diligent * * * this does not absolve the prosecution of its *Brady* responsibilities. As the Supreme Court reiterated just last Term, '[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.' *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256, 1275 (2004).

Id. at 912-13. Indeed, the Ninth Circuit found that the case presented "an even stronger argument for disclosure" than *Banks* because "defense counsel here relied not merely on the force of *Brady* itself, but also – as with the prosecution's claimed 'open file' policy in *Strickler* [v. *Green*] – on affirmative representations by the prosecution that it was keeping the defense apprised of developments in the investigation. Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.* at 913.

Other Ninth Circuit precedent reaches the identical result. See *Benn* v. *Lambert*, 283 F.3d 1040 (2002) (when defendant

"knew of the experts' existence but had been supplied with evidence by the state that the experts' view supported the state's theory," he "is not required to assume that the state has concealed material information and has thereby obligated him to ascertain the *Brady* material on his own"); *United States* v. *Howell*, 231 F.3d 615, 625 (2000) ("The availability of particular statements through the defendant himself does not negate the government's duty to disclose."); *United States* v. *Shaffer*, 789 F.2d 682, 690 (1986) ("[W]hile the government did apprise Shaffer's counsel of tapes that detailed Durand's involvement, such disclosure was inadequate because the government also told Shaffer's counsel that these tapes would be of no value to Shaffer's defense. *This later statement by the government negates any disclosure made in the earlier statement.*" (emphasis added)).

The Tenth Circuit has likewise rejected a "diligent defendant" exception to *Brady*. In *Banks* v. *Reynolds*, 54 F.3d 1508 (1995), that court rejected the government's argument that the defendant's failure to conduct an investigation obviated its obligation under *Brady* to disclose information regarding the arrest of two other suspects, the testimony of a witness that the second suspect had confessed to the crime, the fact that the second suspect had been bound over for the murder on a finding of probable cause, and the second suspect's guilty plea on the possession of a forged instrument charge. *Id* at 1511. The Tenth Circuit accepted that "[w]hether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation" in the limited sense that "if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." *Id.* at 1517. But outside that context, the court concluded, "the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge. Simply stated, '[i]f the prosecution possesses evidence that, in the context of a particular case is ob-

viously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is made or whether no request is made.'" *Ibid.* (quoting *Smith* v. *Secretary of N.M. Dep't of Corrections*, 50 F.3d 801, 827 (CA10 1995)). "[T]he fact that defense counsel 'knew or should have known' about the * * * information * * * is *irrelevant* to whether the prosecution had an obligation to disclose the information. The *only relevant inquiry* is whether the information was 'exculpatory.'" *Ibid.* See also *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (CA10 1999) (reaffirming *Banks* v. *Reynolds*, and excusing *Brady* violation only when the "defendant already has a particular piece of evidence"); *Smith*, 50 F.3d at 833 (rejecting state's argument that *Brady* violation was excused because evidence was available from police evidence room upon request).

The D.C. Circuit agrees with the Ninth and Tenth Circuits that there is no "due diligence" exception to *Brady*. In *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887 (1999), that court held that the government violated *Brady* by failing to disclose a cooperation agreement between prosecutors and a witness. The court expressly rejected "the government's appellate argument that it did not breach a disclosure obligation with respect to Jones' cooperation agreements because that information was otherwise available through 'reasonable pre-trial preparation by the defense.'" *Id.* at 896-97. The D.C. Circuit relied on this Court's unambiguous determination in *Strickler* that "the prosecutor is responsible for 'any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" *Id.* at 897 (quoting *Strickler*, 527 U.S. at 275 n.12 (quoting in turn *Kyles* v. *Whitley*, 514 U.S. at 419, 437 (1995))). On that basis, the D.C. Circuit concluded that "defense counsel was no more required to subpoena the officers to learn of their agreements, than she was to subpoena the prosecutor to learn of hers. The appropriate way for defense counsel to obtain such information was to make a *Brady* request of the prosecutor, just as she did." *Ibid.*

The D.C. Circuit's decision in *In re Sealed Case* applies the same rule that court adopted more than thirty years earlier in *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (1966). In *Levin*, the court recognized that in *other* contexts "a finding of lack of due diligence will defeat a motion for a new trial based only upon the significance of newly discovered evidence." *Id.* at 291. But the D.C. Circuit explicitly concluded that a prosecutor's duty to disclose relevant evidence is different: "appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceedings, and relief * * * may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greater resources, to be the 'winner.'" *Ibid.*

The D.C., Ninth, and Tenth Circuits unquestionably would have affirmed the district court's determination in this case that petitioner was entitled to a new trial. Those courts squarely hold that prosecutors' violations of *Brady* are not in any respect excused by a defendant's ability to uncover exculpatory evidence independent of the government. They would accordingly reject the Third Circuit's holding that the government was free to misstate the contents of the Florida documents because it made those documents available to petitioner for his own inspection.

Indeed, a court that rejects the "due diligence" exception would find the facts of this case particularly troubling. The government's offers to make the Florida documents "available" were of limited value because the government also indicated that petitioner would *not* be entitled to review those documents that the government regarded as relevant only to the Florida investigation.[4] When the government did finally

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[4] See, *e.g.*, Pet. App. 10a (Prosecutor: "They may not bear on this case, and I don't know * * * if it is appropriate for Mr. Pelullo to use this case as a vehicle to go on a fishing expedition as to some

agree to allow petitioner access to the documents, it insisted that petitioner – who was jailed and impoverished – bear the costs of photocopying all of them, conservatively estimated at over $50,000 (see Pet. C.A. Br. 45 n.10).[5] It is not at all surprising that, rather than accepting the government's offer, petitioner relied upon the government's insistence that the documents were irrelevant.

2. The Third Circuit's ruling that the prosecutors' misrepresentations to petitioner were excused by petitioner's supposed lack of diligence also widens a separate circuit conflict over the *scope* of any "due diligence" exception to *Brady*. The First, Second, Fourth, and Fifth Circuits agree with the Third Circuit – and disagree with the D.C., Ninth, and Tenth Circuits – that there is generally a "diligent defendant" obligation to seek out exculpatory evidence. But the First, Second, Fourth, and Fifth Circuits would nonetheless reach the opposite result of the Third Circuit in the recurring factual circumstances presented by this case.

a. The First and Fifth Circuits have squarely held that, although there is a general requirement of "diligence,"[6] the

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other investigation which is currently going on Florida. I can confer with the Assistant U.S. Attorney in Florida to be sure that is the case. If she tells me that * * * the documents that are in Jacksonville bear on her investigation and do not bear on Compton, I would object and would ask the Court to advise Mr. Pelullo that * * * he is not entitled to those documents.").

[5] Given the government's representation that the documents were irrelevant, and the fact that petitioner had no grounds to dispute this claim, petitioner would have had no basis for requesting that the documents be copied at the government's expense. Even if he could have raised the funds himself, petitioner had no reasonable expectation that he would be reimbursed for the massive copying costs. Contra Pet. App. 23a n.15 (relying on the fact that reimbursement was theoretically possible).

[6] See *Rector* v. *Johnson*, 120 F.3d 551, 558-59 (CA5 1997) ("The State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the pos-

prosecution violates *Brady* if it misleads the defendant about exculpatory evidence, even if the defendant could otherwise have discovered the evidence himself. The First Circuit's rule is embodied by *McCambridge* v. *Hall*, 303 F.3d 24 (2002). In that case, the defendant could have discovered the criminal record of a government witness through his own investigation but had been advised by the prosecution that the witness did not have one. The court of appeals, citing this Court's decision in *Strickler*, held that the defendant was entitled to rely upon the government's representations. *Id.* at 48-49. Notably, the court of appeals found it irrelevant that the government's representations had been "equivocal" in the sense of "the prosecutor's occasional use of the words 'as far as I know.'" *Ibid.* The First Circuit held that the government "cannot escape its *Brady* obligations by qualifying its nondisclosure of exculpatory evidence and then shifting its disclosure burden to defense counsel. Moreover, the potential mischief invited by the Commonwealth's argument provides strong reason for rejecting it." *Ibid.*

To the same effect is *Freeman* v. *Georgia*, 599 F.2d 65 (1979), in which the Fifth Circuit held that prosecutors violated *Brady* by concealing the location of a witness who would provide exculpatory testimony. The court acknowledged that the defendant could have attempted to subpoena the witness or moved for a continuance or mistrial when she did not appear. *Id.* at 68. Yet, as it emphasized, the witness statement that the government had disclosed to the defense had not included the exculpatory material. "When a police statement misleads the defense into believing that evidence will not be favorable, the state cannot thereafter argue that it

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session of the defendant or can be discovered by exercising due diligence."); *Lugo* v. *Munoz*, 682 F.2d 7, 9-10 (CA1 1982) ("Since the information at issue here was available to the defense attorney through diligent discovery, we find that the prosecutor's omission was not of sufficient significance to result in the denial of the defendant's right to a fair trial." (internal quotation marks omitted)).

was a waiver not to request it. A defendant cannot have waived more than what he knew existed." *Id.* at 72. See also *Hughes* v. *Hopper*, 629 F.2d 1036, 1039 (CA5 1980) (reaffirming *Freeman*).

b. The Second and Fourth Circuits recognize another exception to the "diligent defendant" requirement: they hold that a defendant's obligation to exercise diligence does not extend to circumstances in which the government provides the defense with related evidence, thereby giving the impression that full disclosure has been made. Under that approach, the government's conduct in this case clearly violated *Brady*: it not only disclosed six boxes of materials that it had culled from the Florida documents and thereby implied that the remaining files were irrelevant, but it also explicitly assured petitioner that its disclosure had been complete.

United States v. *Payne*, 63 F.3d 1200, 1208-09 (CA2 1995), recognized the Second Circuit's rule that ordinarily "evidence is not considered to have been suppressed within the meaning of the *Brady* doctrine if the defendant or his attorney 'either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence.'" (quoting *United States* v. *Zackson*, 6 F.3d 911, 918 (CA2 1993)) (alteration in original and other quotation marks and citations omitted). However, the court proceeded to hold that the defendant was not obligated to search a public court file for a witness's affidavit when the government had already produced "other materials concerning [the witness], including numerous documents relating to the federal investigation and her prosecution. * * * A defendant receiving such documents from the government could reasonably assume that the court files did not include other undisclosed exculpatory and impeachment documents pertaining to [the witness] * * *." *Ibid.*

The Fourth Circuit recognized a similar exception to its general diligence requirement in *United States* v. *Ellis*, 121 F.3d 908 (1997). In that case, prosecutors responded to the defendant's request that the government disclose all *Brady*

material by indicating that they had provided all relevant FBI reports. As in this case, the government had provided some – but not all – of the relevant material. The Fourth Circuit held that even if the defendant could have uncovered information available in the undisclosed FBI report from other sources, he was not obligated to do so. *Id.* at 914-15. See also *id.* (citing *Barnes* v. *Thompson*, 58 F.3d 971, 984 (CA4) (Murnaghan, J., concurring) ("A reasonable defendant would not have looked into the matter any further once the prosecuting attorney represented that the Commonwealth did not possess exculpatory evidence."), cert. denied, 516 U.S. 972 (1995)).[7]

c. Both the Second and Fourth Circuits have also held that a defendant's duty to investigate does not extend to evidence that does not become relevant until trial. Those courts recognize that, at that very late point in the proceedings, it is not reasonable to expect the defense to divert its attention towards further investigation. Rather, the government must make the disclosure itself. See *Leka* v. *Portuondo*, 257 F.3d 89, 100-03 (CA2 2001) ("[O]nce trial comes, the prosecution may not assume that the defense is still in the investigatory mode."); *United States* v. *Kelly*, 35 F.3d 929, 937 (CA4 1994).

* * * *

Because several other courts of appeals reject the Third Circuit's rule that prosecutorial misrepresentations about the

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[7] State courts have adopted the same rule. See, *e.g.*, *Prewitt* v. *State*, 819 N.E.2d 393, 407-08 (Ind. App. 2004) (no failure to exercise due diligence when defendant "justifiably relied upon these affirmative misrepresentations"); *Ware* v. *State*, 702 A.2d 699, 708-09 (Md. 1997) (adopting Second Circuit's decision in *Payne*).

For its part, the Fifth Circuit has recognized a "diligent defendant" exception to *Brady*, but in an unpublished opinion acknowledged that, under this Court's precedents, that exception is inapposite when the government represents that no further exculpatory evidence exists. *Mathis* v. *Dretke*, 124 Fed. Appx. 865, 876-77, cert. denied, 2005 U.S. LEXIS 4922 (2005).

availability of relevant evidence are excused by the defendant's own ability to discover that evidence, and because the large number of cases in which the question arises demonstrates that it is an important and recurring question of federal law, certiorari should be granted here, just as it was in *Strickler*.

II. The Third Circuit's Holding That Prosecutorial Misrepresentations About The Availability Of Relevant Evidence Are Excused By A Defendant's Ability To Uncover That Evidence Himself Conflicts With This Court's Precedents.

Certiorari is also warranted because the Third Circuit's decision is contrary to this Court's precedents. The court of appeals held that the government's misstatements were excused because it had previously provided petitioner with access to those documents: "The fact of the matter is that the government's post-1996 representations did not eliminate its previous offers to make the warehouse documents available to the defense, and in no way absolved the defense of its failure to exercise due diligence during the many months between indictment and trial." Pet. App. 27a. That ruling conflicts with this Court's precedents, which firmly establish that the government violates *Brady* when it misrepresents the nature of available, relevant evidence, even when the defendant could have acquired the evidence himself.

1. As discussed *supra* at 11, this Court granted certiorari in *Strickler* v. *Green* to resolve the established circuit conflict, also presented by this case, over whether there is a "due diligence" exception to prosecutors' duty to disclose relevant evidence under *Brady*. While the *Strickler* Court reversed the Fourth Circuit's judgment denying the petitioner's *Brady* claim, it did so without squarely resolving the circuit conflict presented. Instead, the Court focused on the fact that the prosecution had misstated the availability of relevant evidence. 527 U.S. at 283-84 n.23. The Court also found it significant that the prosecution had disclosed some related ex-

hibits. *Id.* at 284. "[I]f a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." *Id.* at 283-84 n.23. The government's conduct in petitioner's case is indistinguishable: disclosing six boxes of files from the Florida warehouse and representing that these boxes contained all of the evidence relevant to petitioner's case.

This Court subsequently reiterated and applied *Strickler*'s holding in *Banks* v. *Dretke*, 540 U.S. 668 (2004), in which prosecutors argued that their failure to disclose certain relevant witness statements did not violate *Brady* because the defense could have located the witness itself. The *Banks* Court noted that it had "rejected a similar argument in *Strickler*," in which the state had "contended that examination of a witness' trial testimony, alongside a letter that witness published in a local newspaper, should have alerted the petitioner to the existence of" the statements. *Banks*, 540 U.S. at 695-96. Accordingly, the *Banks* Court rejected the prosecution's argument, finding that because "the State asserted, on the eve of trial, that it would disclose all *Brady* material," "[a]s *Strickler* instructs, Banks cannot be faulted for relying on that representation." *Id.* at 693. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. Rather, a defendant is "entitled to treat the prosecutor's submissions as truthful." *Id.* at 698.

The wisdom of this Court's holdings in *Strickler* and *Banks* that prosecutors must be held responsible for their representations regarding the existence of relevant evidence is manifest. The premise of the *Brady* doctrine is that defense counsel and courts will rely on the government's representations that full disclosures have been made. Otherwise, the government would be bombarded by constant demands from defendants and disclosure orders from courts. Defense counsel would moreover be required to investigate every possible

source of documents, inevitably delaying the criminal justice process. It is accordingly well-settled, as *Strickler* and *Banks* make clear, that the government must honestly represent the completeness of its disclosures at all stages of the proceedings.

The district court's ruling ordering a new trial in this case is plainly correct under this Court's precedents, and the Third Circuit's contrary ruling should be reversed. Because of the government's misrepresentations, petitioner's counsel did not direct that the Florida files be searched for the documents that – as the district court later found – seriously undermined the credibility of the government's witnesses and, hence, the confidence in petitioner's conviction. Counsel's failure to do so is not surprising, given that it is undisputed that prosecutors personally advised him at the time of trial "that * * * there were no documents in Jacksonville pertaining to Compton Press or the charges against Mr. Pelullo in this district and that I should not bother to go to Jacksonville." Pet. App. 15a.

The misrepresentations that the government made to petitioner's counsel are far more substantial than the misstatements in *Strickler* and *Banks*. Although the court of appeals stated, without explanation, that the government's representations were "in many instances, equivocal," Pet. App. 25a, the factual findings of the district and the evidence are to the contrary. As the government conceded in its brief below, it advised petitioner in no uncertain terms that "it had culled all relevant material from the [Florida] warehouse documents." Gov't C.A. Br. 57. And the district court found that, "*time and again*," the government assured petitioner and that court that it "had gotten all the relevant documents from the Florida warehouse." C.A. J.A. 3930 (emphasis added). In 1994, after the court specifically directed the government to "find out" if there were relevant documents in Florida "and if there are, make them available to the defendant[]," the prosecutor responded: "Again it is our position that, while I believe all documents that were relevant in Florida we now have and are available to Mr. Pelullo in this case. If there are documents

that we don't have that bear on this case, and I doubt that there are, but I will look into it, we'll make them available to Mr. Pelullo." Pet. App. 11a. The district court directed the prosecutor to consult with an agent about the status of the Florida documents, after which the prosecutor advised the court that the government intended "to bring all relevant documents up [from Florida], so we believe we have all of the relevant documents relevant to the Compton case, here." *Ibid.* The following year, in response to petitioner's specific request for the disclosure of relevant documents, the government advised him that the six boxes of documents already disclosed "represent all of the documents obtained through the Florida search and seizure, which we believe may be relevant to the case pending in the District of New Jersey." *Id.* at 12a.

2. There is no merit to the Third Circuit's contention that this case can be "distance[d]" from *Banks* and *Strickler* on the ground that "there is no indication that the government had knowledge about the exculpatory nature of the warehouse documents," Pet. App. 22a, such that the government's affirmative representations are far less susceptible of reliance * * *." *Id.* 29a n.19 (emphasis in original). The government's representations regarding its understanding of the contents of the Florida documents were "less susceptible of reliance" if, and *only* if, the government advised petitioner that it did not know what information the documents contained. In fact, the government did the opposite. It flatly represented not only that the documents were not relevant, but also that it had reviewed the documents. As the district court expressly found and the court of appeals did not doubt, "[t]he *first indication* that the government's assurances were incorrect occurred after the trial in this case when [petitioner's] paralegal examined documents in connection with another proceeding in which defendant was involved." Pet. App. 60a (emphasis added).

Also relevant is the government's decision to cull six boxes of relevant materials from the Florida documents,

which it could have done – or so petitioner reasonably would have understood – only after reviewing the Florida documents for relevance. As was found by the district judge who supervised all of the proceedings in this case, the government's position "ignores the reality of the situation and it ignores the representations that government counsel repeatedly made to the court and to defense counsel that the six boxes of documents that the government extracted from the mass of documents in the Florida warehouse contained everything relevant to defendant's case and that the remaining documents 'are not relevant to this case.'" Pet. App. 59a.

The Third Circuit's contention that the government's *Brady* violation was excused because it was not purposeful is furthermore flawed as a matter of law and fact. It is well-settled that *Brady* is violated by the "inadvertent" failure to disclose relevant evidence to the defense. *Strickler*, 527 U.S. at 289. Accord, *e.g.*, *Gantt*, 389 F.3d at 912 ("*Brady* has no good faith or inadvertence defense." (citing *United States* v. *Agurs*, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it." (footnote omitted)); *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) ("Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.").). The *Brady* rule is designed to ensure that the defendant receives a fair trial, not to punish prosecutors for bad-faith conduct. Moreover, as a matter of fact, the prosecution's misconduct here *was* "knowing" in every relevant sense. The government represented both expressly and impliedly that it had reviewed the Florida documents, *when it knew that it had not done so*. Even if this Court were to change course and announce an exception to *Brady* for inadvertent misconduct, this case accordingly would not fall within that exception.

The Third Circuit also asserted in passing that the government could not be held responsible for its *Brady* violation

because "there could not be any genuine reliance by Pelullo on the government's statements, as there was no realistic opportunity for [his counsel] to review the warehouse documents during the two-week window Pelullo had left him to prepare for trial." Pet. App. 27a. This argument has no real substance. On the question of "reliance," the district court credited the sworn representation of petitioner's counsel (undisputed by the government) that, as he advised the prosecutors at the time, "either I or someone from my law firm would go to Jacksonville to review the documents seized from Mr. Pelullo's warehouse." *Id.* at 15a. There is no basis whatsoever to question that finding, much less overturn it for "clear error." The Third Circuit's point seems to be that the government's conduct was effectively "harmless" because petitioner would have been unable to uncover the evidence even absent the government's misrepresentations. But it could point to no evidence to support that bald assertion, for there is none. To the contrary, once the government's witnesses gave false testimony regarding very specific transactions, petitioner did not need to review the entire mass of documents held by the government. Rather, petitioner only needed to secure particular documents; and the court of appeals *itself* pointed out "*the ease* with which Pelullo discovered the relevant warehouse documents after trial." Pet. App. 28a (emphasis added). There were, moreover, numerous days throughout the trial in which no proceedings occurred and the records could have been searched. At the very least, if prosecutors had finally disclosed at trial that they did not know whether the Florida documents contained relevant evidence impeaching the government's witnesses, petitioner could have sought "a continuance of the trial to allow the defense to examine or investigate" those documents. *United States* v. *Kelly*, 14 F.3d 1169, 1176 (CA7 1994) (continuance is appropriate response to *Brady* disclosure at trial); *United States* v. *Higgins*, 75 F.3d 332, 335 (CA7 1996) (same).[8]

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[8] With respect to the government's separate statements prior to the

The Third Circuit's ruling also represents a direct challenge to the validity of this Court's seminal ruling in *Giglio* v. *United States*, 405 U.S. 150 (1972), which held that the prosecution is obligated to disclose to defendants testimony that impeaches government witnesses. Frequently, *Giglio* obligations arise as a consequence of testimony offered during the trial itself. "[T]he duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987). Other courts of appeals accordingly hold that the government is required to disclose evidence when the disclosure becomes relevant; those courts never suggest, as the Third Circuit concluded in this case, that the failure to do so is excusable because it would be "too late" for the defendant to make use of the evidence. See, *e.g.*, *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 895 (CADC 1999); *United States* v. *Hanna*, 55 F.3d 1456, 1460 (CA9 1995); *United States* v. *Kojayan*, 8 F.3d 1315, 1323-24 (CA9 1993).

3. Finally, the Third Circuit stated that two factual circumstances presented by the case were of particular relevance to its analysis. Yet neither factual circumstance undercuts petitioner's *Brady* claim. And neither bears on the Third Circuit's unambiguous explanation that its ruling rested on a supposed "due diligence" obligation for defendants, or other-

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trial period, the court of appeals summarily stated that the district court's factual finding that petitioner's counsel had relied on these pre-trial representations was "fanciful" and "clearly erroneous" because counsel secured a "delay in the trial in order to permit him to review the multitudinous documents possibly relevant to the case, including the warehouse documents." Pet. App. 26a. But, as an accompanying footnote acknowledges, given the government's representations, petitioner's counsel *never* stated that he intended to review the Florida documents. *Id.* at 26a n.17.

wise undercuts the appropriateness of this case as a vehicle for resolving the questions presented.

First, the court of appeals noted that the government had kept in Florida "massive amounts of documents," such that the government faced a "concomitant practical difficulty * * * in discovering and revealing all *Brady*-type material." Pet. App. 19a. That is of course no answer, for the government represented that it knew that the Florida documents did not contain relevant evidence. To accept the government's unsatisfactory excuse would be to undercut very substantially the *Brady* rights of defendants in commercial white collar prosecutions, which regularly involve vast collections of documents.

Second, the court of appeals relied on the fact that the documents in question were the records of businesses controlled by petitioner. Pet. App. 21a. However, courts that decline to adopt a "due diligence" standard would deem this fact irrelevant. See *supra* at 12-16 (discussing precedents holding that *Brady* is violated by failure to make disclosure of evidence known to the defendant personally). Moreover, even if a special rule should apply when the defendant has personal knowledge of the evidence in question, this is not such a case. There is no serious suggestion that petitioner had personal knowledge of all the documents held by the government, the overwhelming majority of which were not created by him personally but instead were simply produced by his businesses. As the court of appeals itself emphasized, the government had retained a massive collection of materials. The district court was thus correct to find that "it would be fanciful to expect that [petitioner] would remember in detail the contents of an enormous body of documents assembled in a warehouse." Pet. App. 60a.

In any event, the Third Circuit's emphasis on the petitioner's relationship to the warehouse documents misses the point entirely. Petitioner was unaware of *which* records the government continued to hold in Florida, because prosecutors

had returned 75,000 pounds of documents to him without differentiating that mass of materials from the vast collection they had retained. The *only* representation by the government regarding the retained materials was that they pertained only to the ongoing Florida investigation, *not* the proceedings regarding Compton Press in New Jersey. Thus, when the government's witnesses gave false testimony at trial, it was entirely reasonable that petitioner would not look to the materials held by the government in Florida for documents that would establish the truth.[9]

* * * *

Because the Third Circuit's holding that the prosecutor's misrepresentations in this case were excused by petitioner's ability to review the Florida documents is wrong on the merits, and because the question presents a fundamental issue regarding the government's *Brady* obligations, certiorari should be granted.

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[9] In any event, the government also withheld a significant handwriting report that was not a record produced by any of petitioner's businesses. Although petitioner was a party to prior litigation in which the report was submitted, he was not aware of the report because he was involved only in unrelated claims in that case. Pet. App. 67a. The government's failure to disclose the report thus can be sustained only on the theory that petitioner had a "due diligence" obligation to uncover it on his own. See Gov't C.A. Br. 65-66 ("Even if [petitioner] did not personally receive a copy of the report, those opinions provided him with sufficient notice of the report's existence to preclude a finding that the government suppressed it.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 19, 2005

UNITED STATES OF AMERICA,
Appellant at No. 02-2710
v.
LEONARD A. PELULLO,
Cross-Appellant at No. 02-2808;

UNITED STATES OF AMERICA
v.
LEONARD A. PELULLO,
Appellant at No. 02-2957

Nos. 02-2710 / 02-2808 / 02-2957

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

September 28, 2004, Argued

February 25, 2005, Filed

SUBSEQUENT HISTORY: As Amended, March 8, 2005.

PRIOR HISTORY: [1]Appeal from the United States District Court for the District of New Jersey. (Crim. No. 94-276 / Civ. No. 01-124). District Judge: Honorable Dickinson R. Debevoise. United States v. Pelullo, 185 F.3d 863, 1999 U.S. App. LEXIS 16057 (3d Cir. N.J., 1999)

DISPOSITION: Affirmed in part, reversed in part and remanded.

OPINION: Garth, Circuit Judge:

Leonard A. Pelullo was indicted on December 9, 1994. He was convicted by a jury on November 8, 1996, following

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[1] The Supreme Court of the United States denied certiorari on January 10, 2000. *Pelullo* v. *United States*, 528 U.S. 1081, 145 L. Ed. 2d 675, 120 S. Ct. 801 (2000).

a six-week trial in the United States District Court for the District of New Jersey, of all 54 counts of the indictment, which charged conspiracy and substantive counts to embezzle funds belonging to an employee benefit plan and to launder the proceeds of that embezzlement. The District Court[2] denied a host of post-trial motions, and imposed a prison sentence of 210 months for each of the money-laundering counts and 60 months for the conspiracy and embezzlement counts, to be served concurrently with the twenty-four year prison sentence previously imposed against Pelullo for prior racketeering and wire fraud convictions in the District Court for the Eastern District of Pennsylvania. The District Court also ordered Pelullo to make restitution in the amount of $ 898,688 and to forfeit $ 3,562,987 to the United States.

After the judgment in this case was affirmed by this Court on direct appeal, 185 F.3d 863 (3d Cir. 1999) (table decision), Pelullo filed a series of motions for a new trial pursuant to Federal Rule of Criminal Procedure 33. Pelullo essentially argued that the government failed to disclose exculpatory evidence at the time of trial, in violation of its obligations under *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), thus rendering his conviction constitutionally infirm. Additionally, Pelullo filed a motion for collateral relief pursuant to 28 U.S.C. § 2255,[3] contending, *inter alia*, that the District Court failed to provide the jury with specific unanimity instructions in violation of his rights under the Sixth Amendment.

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[2] Pelullo also filed a Notice of Appeal on June 27, 2002 from the District Court's denial of his request for a new trial on the alternative ground that the government had breached his attorney-client privilege. However, he makes no argument to that effect in his briefs. Where, as here, an appellant fails to raise an issue in an appellate brief, even if it was listed in the Notice of Appeal, it is deemed waived. *See Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000).

[3] *See infra* note 25.

On May 17, 2002, after consolidating the new trial motions and the § 2255 motion, the District Court granted Pelullo a new trial, concluding that the government had in fact suppressed material information, in contravention of its *Brady* obligations. The District Court denied Pelullo's request for § 2255 relief, but granted a certificate of appealability with respect to one issue: whether the Court's failure to provide the jury with specific unanimity instructions violated Pelullo's Sixth Amendment rights.

The government has appealed from the grant of a new trial, and Pelullo has appealed from the denial of collateral relief.

Because we conclude that the District Court erred in the threshold suppression determination prescribed by the *Brady* analysis, we will reverse the District Court's grant of a new trial. We also conclude that Pelullo's challenge to the jury instructions is procedurally barred by *United States* v. *Frady*, 456 U.S. 152, 167, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982), and we will thus affirm the District Court's denial of his request for collateral relief. Accordingly, we will direct the District Court to reinstate the judgment of Pelullo's conviction and his sentence. In addition, we will remand to the District Court for resolution of the remaining issues raised by Pelullo in his § 2255 motion, and direct that the District Court, as a priority matter, give serious consideration to vacating its Order of January 29, 2002, which had released Pelullo on bail.

I.

Pelullo has been the subject of federal criminal prosecutions in the Eastern District of Pennsylvania, the Middle District of Florida, and the District of New Jersey. He has, moreover, been persistent in challenging his various convictions, filing numerous notices of appeal with this Court

from both the Pennsylvania and New Jersey prosecutions.[4] In this appeal, however, which concerns only the New Jersey proceedings, it is the government that is appealing the District Court's grant of a new trial based on the government's purported failure to abide by its *Brady* obligations. We are thus called upon to revisit the parameters of prosecutorial obligations under *Brady*. In doing so, and for reasons which will later become apparent, we are mindful of the well-established principle that "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *United States* v. *Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) (citation omitted).

II.

We have jurisdiction over the government's appeal under 18 U.S.C. § 3731 and Pelullo's appeal under 28 U.S.C. § § 2253, 2255. Pelullo, however, raised a number of issues in his § 2255 motion for collateral relief, only one of which was certified by the District Court for interlocutory appeal under 28 U.S.C. § 1292(b). We granted Pelullo permission to appeal under § 1292(b), thereby establishing appellate jurisdiction

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[4] See, e.g., *United States* v. *Pelullo*, 964 F.2d 193 (3d Cir. 1992) ("*Pelullo I*") (reversing all but one of Pelullo's wire fraud convictions in the Eastern District of Pennsylvania due to the erroneous admission of unauthenticated bank records); *United States* v. *Pelullo*, 14 F.3d 881 (3d Cir. 1994) (reversing all of Pelullo's convictions on the ground that it was error to use prior conviction upheld in *Pelullo I* as collateral estoppel to establish predicate offense in trial before second jury); *United States* v. *Pelullo*, 105 F.3d 117 (3d Cir. 1997) (reversing Pelullo's wire fraud and racketeering convictions by third jury based primarily on government's Brady violation in failing to disclose exculpatory evidence); *United States* v. *Pelullo*, 173 F.3d 131 (3d Cir. 1999) (affirming Pelullo's wire fraud and racketeering convictions after his fourth trial in the Eastern District of Pennsylvania); *United States* v. *Pelullo*, 185 F.3d 863 (affirming the convictions in this case).

only as to that one issue. We express no opinion as to the validity of Pelullo's remaining contentions, which will need to be addressed in the first instance by the District Court upon remand.

We ordinarily review a district court's ruling on a motion for a new trial on the basis of newly discovered evidence for abuse of discretion. *See, e.g., Government of Virgin Islands* v. *Lima*, 774 F.2d 1245, 1250 (3d Cir. 1985). However, where, as here, the motion for a new trial is based on a *Brady* claim, which presents questions of law as well as questions of fact, we "will conduct a de novo review of the district court's conclusions of law as well as a 'clearly erroneous' review of any findings of fact." *United States* v. *Perdomo*, 929 F.2d 967, 969 (3d Cir. 1991) (citing *Carter* v. *Rafferty*, 826 F.2d 1299, 1306 (3d Cir. 1987)). Further, we exercise plenary review over the District Court's denial of collateral relief. *United States* v. *Lloyd*, 188 F.3d 184, 186 (3d Cir. 1999).

III.

A thorough review of the trial evidence is set forth in the District Court's opinion denying various post-trial claims submitted by Pelullo before his direct appeal in this case, and thus need not be recounted in detail here. *See United States* v. *Pelullo*, 961 F. Supp. 736, 744-50 (D.N.J. 1997), *aff'd*, 185 F.3d 863. As such, we begin our background discussion by only briefly recapitulating the salient facts of that factual summary so as to contextualize the *Brady* issues raised in this appeal.

Pelullo's indictment and subsequent conviction arose from the government's investigation of Pelullo's management of Compton Press, Inc. ("Compton Press"), the Compton Press, Inc. Retirement Plan, and the Compton Press, Inc. Thrift Plan (collectively, the "benefit plans"). At all relevant times, Pelullo controlled Compton Press and, concomitantly, the benefit plans. Through his long-time associate, David Hellhake, and a number of other employees and associates, Pelullo systematically diverted benefit plan assets for his own

business and personal uses. Pelullo's *modus operandi* was to use a complex series of wire transfers, which can be classified in three principal sets of transactions.

1. In the first of these transactions, Pelullo withdrew over $ 1.15 million from various brokerage accounts owned by the benefit plans in order to finance an attempted corporate takeover of DWG Corp. (a holding company for Arby's and Royal Crown Cola), as well as to pay for certain personal expenses. He transferred that money to two separate accounts, hiding the true nature of the transactions from the plan Trustees. Pelullo transferred $ 750,000 to a corporate bank account of Granada Investments, Inc., the company Pelullo used to effect the contemplated takeover. Of these funds, some $ 70,000 were subsequently filtered into various accounts owned by Pelullo and his family members. Pelullo then transferred $ 400,000 to Paribas, an investment broker retained by Pelullo to handle the DWG takeover.

2. The second set of transactions involved efforts to finance the purchase of Ambassador Travel, a bankrupt company, through a Pelullo-controlled entity called Away to Travel South ("ATTS"). Pelullo caused $ 1.326 million to be transferred from the benefit plans' brokerage accounts, with the bulk of funds going toward the purchase of Ambassador Travel. Much of the money remaining after the ATTS purchase eventually filtered down to Pelullo and his family. Pelullo accomplished this transaction by disguising the transfers as a loan to ATTS.

3. The third set of transactions focused on the transfer of monies from an annuity contract, the assets of which belonged to the Compton Press, Inc. Retirement Plan. Pelullo, through his subordinates, terminated the contract. He then appropriated the proceeds from the annuity, which totaled $ 1.4 million, to finance other acquisition projects and personal endeavors.

At issue in this appeal are documents obtained *after* trial from two distinct sources. The first set of documents was

drawn from the hundreds of thousands of business records Pelullo had stored in a Miami warehouse (the "warehouse documents"). These documents had been seized by the FBI in connection with an investigation of Pelullo (unrelated to this case) in the Middle District of Florida ("MDFLA"). Pelullo's lawyers claimed to have received the documents from the United States Attorney's Office ("USAO") in the MDFLA after the completion of the trial in this case. Discovery had produced these documents in the criminal prosecution against Pelullo in Florida.

The second set of documents were generated in a civil lawsuit against Pelullo and others regarding Pelullo's defalcations from the Compton Press benefit plans. Under the Freedom of Information Act ("FOIA"), Pelullo had obtained the documents after the instant trial. He had obtained them from the Pension and Welfare Benefits Administration ("PWBA") of the United States Department of Labor ("DOL") ("PWBA documents").[5]

As we discuss later in this opinion, this case focuses on the threshold question of whether the government suppressed these documents within the meaning of *Brady* and its progeny. *See* discussion *infra* at 20-22. Without such suppression, there can be no *Brady* violation, notwithstanding the putative materiality of the subject documents. This suppression determination, moreover, is a highly factual inquiry, which requires us to carefully explore the relevant circumstances surrounding Pelullo's various prosecutions. We do so now, turning first to those events relevant to the warehouse documents.

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[5] Pelullo also alleged that the government had suppressed other documents generated in two lawsuits against an attorney named Kenneth Falk and his law firm. The District Court, however, declined to address the *Brady* implications of these documents, after granting a new trial based on the suppression of the warehouse documents and the PWBA documents. Accordingly, these documents form no part of the present appeal.

IV.

A.

While the United States Attorney's Office in New Jersey was investigating the Compton Press matter, the USAO in the MDFLA was investigating allegations of bankruptcy fraud and other related offenses. In October of 1991, the FBI executed a search warrant for a 2400-square foot warehouse in Miami, which contained business records of twenty-five of Pelullo's companies. As Pelullo himself stated, the Florida warehouse included "every document that [he] had generated in the last 20 years." *United States* v. *Pelullo*, 917 F. Supp. 1065, 1077 (D.N.J. 1995). These documents were in a "disorganized state and often mislabeled," with some of the boxes bearing numbers but no further identification. *Id.* The FBI seized 904 boxes, 114 file cabinets, and 10 file cabinet drawers of corporate and financial records, transported them to a secure location in Jacksonville, Florida, identified and retained those documents relevant to the MDFLA investigation, and returned 75,000 pounds of warehouse documents to Pelullo in September of 1992. After returning the 75,000 pounds of documents to Pelullo, the Florida FBI agents retained roughly 160 boxes and 36 file cabinets of warehouse records.

In or around June of 1992, Kathleen O'Malley, an Assistant United States Attorney ("AUSA") from the MDFLA, wrote to one of Pelullo's lawyers, offering to transport the 75,000 pounds of released warehouse documents at the government's expense from Jacksonville to Miami (where Pelullo maintained his principal place of business), and to further transport those documents to Philadelphia (where Pelullo had been indicted) for approximately $ 8,000. AUSA O'Malley also sent the lawyers a partial index of all of the warehouse documents, though she admitted that the index was "obsolete," as it failed to show all of the items seized or indicate which of the listed items had been retained.

Thereafter, the government delivered those 75,000 pounds of documents to Pelullo.

Also in 1992, AUSA O'Malley informed Pelullo's lawyers that the government would retain certain other documents that had been seized in the warehouse, but "would be willing to provide reasonable access to Mr. Pelullo's attorneys, and to permit counsel to copy some or all of the documents."

B.

During a three-day period in 1991, DOL Special Agent Rosario Ruffino (the principal investigator in the District of New Jersey case) and two other agents working on the Compton Press matter traveled to Jacksonville and conferred with the FBI agent in charge of the Florida investigation. Florida FBI agents assisted Agent Ruffino in identifying six boxes of documents from the retained warehouse documents that were relevant to the New Jersey investigation. At a Rule 104 evidentiary hearing[6] on May 16, 1995, Agent Ruffino testified that he had conducted only a cursory review of the warehouse files in Florida "to see if they were related to Compton Press and the profit sharing pension plans." Only after the six boxes of documents arrived in Newark did Agent Ruffino review them in more detail.

On December 22, 1994, AUSA Jose P. Sierra advised Pelullo that the government was making available for his inspection and discovery, pursuant to Federal Rule of Criminal Procedure 16,[7] "miscellaneous documents obtained

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[6] Federal Rule of Evidence 104(a) provides that "preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court."

[7] Federal Rule of Criminal Procedure 16 provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any

pursuant to a search warrant executed on October 23, 1991," referring to the retained warehouse documents. The letter further stated: "the United States is unaware of the existence of any material within the purview of *Brady* v. *Maryland*. If I later become aware of any other such material, I will promptly forward the same to you."

One week later, at a hearing on December 29, 1994, Pelullo acknowledged that he knew that the government possessed documents from the Florida warehouse, and that the warehouse documents included some documents involving Compton Press and the benefit plans. Pelullo asked that those documents be made available for his inspection, and represented that he would go to Jacksonville "if I have to, to take a look at those documents." In response, AUSA Sierra stated:

> As far as documents in Jacksonville . . . I do believe there was an investigation there and I believe documents are in Florida. If those documents are in the custody of the Assistant U.S. Attorney or the agents in Florida, I will talk to them, to see what documents bear on this case. They may not bear on this case, and I don't know, your Honor, if it is appropriate for Mr. Pelullo to use this case as a vehicle to go on a fishing expedition as to some other investigation which is currently going on in Florida. I can confer with the Assistant U.S. Attorney in Florida to be sure that that is the case. If

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of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E).

> she tells me that, in fact, the documents that are in Jacksonville bear on her investigation and do not bear on Compton, I would object and would ask the Court to advise Mr. Pelullo that . . . he is not entitled to those documents.

Pelullo responded that "there might be other items in those files that are relative to my case," and "all I want is the availability to see those files in Jacksonville to see what pertains to this case in my defense."

At this point, the District Court observed that "it would appear that there are documents related to this case in Florida," and suggested that the prosecutor "find out and if there are, make them available to the defendant[]." To this the government answered:

> Again it is our position that, while I believe all documents that were relevant in Florida we now have and are available to Mr. Pelullo in this case. If there are documents that we don't have that bear on this case, and I doubt that there are, but I will look into it, we'll make them available to Mr. Pelullo.

The District Court then suggested that AUSA Sierra confer with DOL Agent Ruffino, who was present in court. After doing so, AUSA Sierra advised the court that Agent Ruffino intended "to bring all relevant documents up [from Florida], so we believe we have all of the relevant documents relevant to the Compton case, here."

Despite these assurances, Pellulo insisted that, even though the government had "culled" documents from the warehouse that pertained to "[the government's] side of the case," *he*, *Pelullo*, had to review all of the warehouse documents to find those which pertained to the defense. AUSA Sierra agreed that Pelullo was entitled access to any such documents, provided that they did not bear on the Florida investigation. The District Court directed the prosecutor to identify for Pelullo those warehouse documents that the government would voluntarily disclose, so that

Pelullo could petition the Court if he sought additional material. The prosecution assured Pelullo and the Court that it had previously disclosed all *Brady* material of which it was aware, and would disclose any additional *Brady* material of which it subsequently became aware.

After January 27, 1995, Pelullo was incarcerated at FCI Fairton, following his conviction in the Eastern District of Pennsylvania. By letter dated February 28, 1995, Pelullo asked AUSA O'Malley to release "certain original documents seized" from the Miami warehouse in order to prepare for the trial in this case, and to provide him with an "inventory of all original documents seized" from the warehouse. In response, AUSA Mark Rufolo, one of the federal prosecutors in this case, informed Pelullo by letter dated March 2, 1995 that the six boxes of documents already provided to Pelullo "represent all of the documents obtained through the Florida search and seizure, *which we believe* may be relevant to the case pending in the District of New Jersey." Mr. Rufolo advised Pelullo, however, that he should make arrangements with the authorities in the MDFLA "should you desire to inspect or copy additional documents taken during the search."

By letter addressed to Edward Plaza, Esq., on March 14, 1995, in response to Pelullo's letter of February 28, 1995, AUSA O'Malley again offered "to have all of the documents in the FBI's possession copied, at Mr. Pelullo's expense." She also offered to obtain an estimate for that cost, and asked Mr. Plaza to advise her "what arrangements Mr. Pelullo would care to make concerning the photocopying charges."

At a hearing on March 28, 1995, Pelullo informed the District Court that, notwithstanding the government's position that the six boxes contained all relevant documents from the warehouse, "*that's not true as to my case. I'm the one that should determine what's relevant or what I'm going to need to defend myself.*" Pelullo asked for a continuance of several months "*to get these documents, review them,*" and otherwise prepare for trial. He assured the District Court that he was

"prepared to tackle the task and defend myself as I have in the past." The District Court urged Pelullo, who at that time was *pro se*, to have his stand-by lawyer, Mr. Plaza, review the documents if Pelullo was unable to review them himself.

At that hearing, moreover, Mr. Rufolo reiterated the government's position that the warehouse documents were "not relevant to this case." However, Mr. Rufolo further stated:

> If Mr. Pelullo has an interest in viewing those documents, that he can make arrangement[s] with the Assistant U.S. Attorney in Jacksonville. She has responded by letter and indicated a willingness, similar to the arrangement I made, to have those documents copied if Mr. Pelullo agreed to pay for the documents.

In an April 27, 1995 letter to the District Court (with a copy to Mr. Rufolo), Pelullo assured the Court that "Mr. Plaza, Esquire is coordinating the efforts to obtain the documents currently held by Kathleen O'Malley, AUSA in Jacksonville, Florida."

In November 1995, a firm trial date of February 1996 was set at Pelullo's request. That date was subsequently adjourned until May 1996, also at Pelullo's request, for additional preparation time. In December 1995, Pelullo informed the District Court that he no longer wanted to proceed *pro se*, and persuaded the Court to elevate Mr. Plaza from stand-by counsel to full counsel.

Mr. Plaza then moved the Court to reschedule the trial from May 6, 1996 to September 1996. The Court conducted a hearing on that motion on March 25, 1996. At that hearing, Mr. Plaza explained that he needed a continuance in order to review the large volume of documents that were pertinent to this case, including the warehouse documents. Mr. Plaza acknowledged that not all of the more than 900 boxes originally seized from the Miami warehouse were relevant to

this case, but adverted to the 58 boxes of documents that he had already received which contained relevant information.

Mr. Plaza further stated that he had "never in [his] professional life . . . come across a case with the number of documents that are involved as in this case . . ." Indeed, he noted that there were "thousands of documents which trace the funds allegedly embezzled from the two Compton Press, Inc. employee benefit plans." These documents, Mr. Plaza said, had "been seized during the course of a search of a warehouse containing many thousands of documents *placed there by Pelullo*." (emphasis added). In light of the multitudinous number of potentially relevant documents, Mr. Plaza urged the District Court to grant the continuance, stating that, "the fact is I owe [Pelullo] a responsibility and I owe the Court a responsibility as well. You appointed me in this case, Judge, and I think you have to give me an opportunity to do the job which you appointed me to do."

Mr. Rufolo, in opposing Mr. Plaza's request for a continuance, informed the Court that members of the prosecution team in this case had examined "maybe a hundred" of the boxes in the warehouse and had brought back to Newark "six boxes of documents" which the investigators "believe were at least important enough to bring here." Mr. Rufolo stated that most of those documents would not be offered into evidence by the government at trial. Mr. Rufolo also acknowledged that it was "*very difficult for me to predict exactly what Mr. Plaza needs*." (emphasis added).

"With utmost reluctance," and "against all [its] better judgment," the District Court granted Mr. Plaza's continuance request. The District Court also noted that the government's presentation, during the four-day Rule 104 hearing concerning the documentary evidence it intended to present at trial, "provided [Pelullo] with a preview of the government's case against him . . . [and provided Pelullo] in systematic form the bulk, if not all of the government's documentary evidence and the summaries based upon that evidence." The

District Court granted another four month continuance in order to permit Mr. Plaza to find a proverbial "needle in a haystack someplace."

C.

On September 10, 1996, only days before the adjourned trial began, Herbert Beigel, Esq., was substituted as Pelullo's counsel. As Mr. Beigel explained to the District Court in an affidavit dated March 23, 2000:

> I also had several conversations with Assistant United States Attorney Mark W. Rufolo concerning the government's production of favorable evidence. Mr. Rufolo advised me that the investigations and/or prosecutions of Mr. Pelullo in the Eastern District of Pennsylvania and the Middle District of Florida were irrelevant to the case before the court in the District of New Jersey.
>
> I told Mr. Rufolo that either I or someone from my law firm would go to Jacksonville to review the documents seized from Mr. Pelullo's warehouse. Mr. Rufolo responded that he had been assured by his agents and the Florida prosecutor that there were no documents in Jacksonville pertaining to Compton Press or the charges against Mr. Pelullo in this district and that I should not bother to go to Jacksonville.

Mr. Beigel further reported that just prior to the start of trial:

> I had a conversation with Mr. Rufolo outside of the courtroom. I specifically asked Mr. Rufolo whether there was any favorable evidence available in the Middle District of Florida that had been seized in the search of Mr. Pelullo's warehouse. Mr. Rufolo responded that he had spoken to the prosecutor in the Middle District of Florida and had been told that the prosecutors in that district were not in possession of any documents relevant to Compton

Press or the charges against Mr. Pelullo in this district.

The government did not contest Mr. Beigel's affidavit.

In a letter dated October 2, 1996, Mr. Beigel requested that AUSA Rufolo "confirm that the Government does not have any additional notes, FBI reports or other documents not already provided that would constitute *Brady* or Giglio[8] material regarding the witnesses the Government intends to call." By letter dated October 4, 1996, by which the government enclosed additional documents concerning its witnesses, Mr. Rufolo stated that the "United States is not aware of any additional *Jencks*,[9] *Giglio*, or *Brady* material."

D.

Following Pelullo's conviction on November 8, 1996 in the District of New Jersey, the Bankruptcy Court for the Eastern District of Pennsylvania, which presided over Pelullo's personal bankruptcy case, appointed Mr. Beigel as special counsel for Pelullo to represent him on the charges brought against him in the MDFLA. Later that month, Mr. Beigel spoke to AUSA O'Malley in the MDFLA "to make arrangements for access to documents in her possession in connection with the pending indictment against Mr. Pelullo in that district." The government agreed to grant Lyn Merritt, a paralegal who worked for Pelullo, access to the documents it kept in Jacksonville. Ms. Merritt subsequently discovered the "warehouse documents" at issue in this appeal.

E.

While the United States Attorney's Office in New Jersey and agents from the Labor Racketeering Office of the DOL (which is responsible for enforcing violations of federal criminal law) were investigating Pelullo's actions with

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[8] *Giglio* v. *United States*, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972) (material that would impeach a government witness).

[9] Jencks Act, 18 U.S.C. § 3500 (statements of any witness).

respect to the benefit plans, officials of the PWBA, a civil arm of the DOL, were monitoring a separate lawsuit, *Gerardi, et al.* v. *Pelullo, et al.*, United States District Court for the District of New Jersey, Civ. No. 89-4069. That case, like this one, involved the conversion of the benefit plans' assets. The PWBA collected documents which had been exchanged in discovery between Pelullo and the other litigants in that civil case.

On June 16, 2000, after Pelullo filed his motion for a new trial based on the Florida warehouse documents, the District Court ordered the government to produce documents held in its files at the DOL, which documents Pelullo had requested under the Freedom of Information Act. As we have indicated, certain of those documents are also at issue in this appeal.

As we noted earlier, the District Court on May 17, 2002 granted Pelullo a new trial, stating that the government had violated its *Brady* obligations. Prior to that time, on January 29, 2002, the District Court granted Pelullo's motion for release from confinement pending resolution of the various post-trial motions. Accordingly, since January 30, 2002, Pelullo has been released on bail, and remains in that status today. *See* Part VII *infra* (remanding for reconsideration of bail).

V.

In *Brady* v. *Maryland*, the Supreme Court held that due process forbids a prosecutor from suppressing "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). To establish a due process violation under *Brady*, then, "a defendant must show that: (1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material either to guilt or to punishment." *United States* v. *Dixon*, 132 F.3d 192, 199 (5th Cir. 1997)

(citations omitted); *see also United States* v. *Higgs*, 713 F.2d 39, 42 (3d Cir. 1983).

Here, the District Court concluded that the government suppressed evidence from two distinct sources- (1) the Florida warehouse and (2) the PWBA's files at the DOL.[10] The District Court also concluded [*210] that the suppressed evidence was both favorable to Pelullo and material, thus establishing a "serious violation of the government's *Brady* obligations."[11] Although the government challenges both the suppression and materiality aspects of the District Court's decision, we only need reach the materiality issue upon concluding that either the warehouse documents or the PWBA documents were suppressed by the government within the meaning of *Brady*. Accordingly, we limit our discussion to a determination of whether *Brady* material was suppressed by the government. As we have stated earlier-we hold that it was not.

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[10] The District Court did not reach the question whether the government suppressed evidence in the files of two civil actions against Kenneth Falk and his law firm. As we observed in note 5, *supra*, matters and documents having to do with the Kenneth Falk litigations are not before us on this appeal. We believe, however, that our holding, and the principles upon which it is based, have equal validity with respect to the documents from the Kenneth Falk litigations. Accordingly, we see no reason for the District Court to revisit this suppression issue.

[11] The District Court did not address or rule upon the materiality of numerous documents discussed in Pelullo's motion and briefed by the parties. While observing that the government had suppressed these items, the Court explained that it was "unnecessary to describe them all in this opinion because the failure to have produced [the 24 items] described [in its Opinion and Order] is sufficient to require the granting of the motion for a new trial."

A.

At the outset, our analysis is informed by certain pragmatic considerations. We are especially mindful of the massive amounts of documents involved in this case and the concomitant practical difficulty faced by the government in discovering and revealing all *Brady*-type material. We can express the reality of the situation no better than the District Court had done in denying Pelullo's previous *Brady* claims based on the non-disclosure of certain other documents:

> Pelullo's method of operation was to conduct his multitudinous business and personal transactions through a host of corporate and partnership entities and through a dizzying succession of wire transfers, both necessary and unnecessary to accomplish an objective. As a result Pelullo was able to conceal the nature of his undertakings and deceive those with whom he was dealing, not only the Employees Benefit Plans which are the subject of this case, but also others who did business with him. All of this activity generated mountains of documents, as disclosed by the search of the Miami warehouse. *No one but Pelullo could comprehend it all in its entirety. He alone, an obviously highly intelligent person, was able to keep track of it all and manipulate it to his advantage.*
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> * * * *
>
> One of the problems in this case is the almost inexhaustible body of materials which relates to it. There is the mountain of records which Pelullo and his companies generated and which is described above . . . . As a practical matter no one, either prosecutor or defense counsel, can ever expect to get all of this material under control. There will always be something more which can arguably be relevant to the issues in this case.

Pelullo, 961 F. Supp. at 750-53 (emphasis added). As the District Court thus recognized,[12] the sheer volume of

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[12] On September 10, 2003, this Court remanded the case to the District Court for consideration of Pelullo's motion to expand the record to include documents that he supposedly first received in response to applications under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Following its review of the FOIA documents, the District Court, in a thorough opinion dated January 7, 2004, denied Pelullo's motion. The District Court observed that:

> defendant's career has consisted of engineering one fraudulent transaction after another, looting one company after another, deceiving one individual or corporation after another, of which Compton Press was only the most recent; during the course of these activities defendant has generated tens of thousands of documents designed to facilitate his fraudulent conduct and has involved countless individuals in his schemes, some innocent victims and some knowing participants; leaving in his wake his many victims; defendant's activities have generated many criminal and civil investigations, each [of] which generated its own mountain of documents; no prosecutor could possibly keep track of the array of documents generated during the course of the many investigations of defendant . . . .

The District Court concluded that this Court's intervening decision in *United States* v. *Merlino*, 349 F.3d 144 (3d Cir. 2003), may have raised the question whether, in its opinion granting Pelullo a new trial on *Brady* grounds, it had imposed an unreasonable burden on the government. Interestingly, the District Court had:

> considered granting the motion [to supplement the record], not because [the FOIA documents] support defendant's motion for a new trial on Brady grounds, but because they might provide grounds for excusing any Brady violations which have been found to have taken place . . . It would be a strange outcome if a defendant

documents interspersed through many jurisdictions, many of which could be relevant to any or all the various prosecutions, seriously weakens any claim that the government suppressed evidence. This holds true for both the warehouse documents and the PWBA documents. As Pelullo himself had admitted when seeking a trial continuance, "I'm the one that should determine what's relevant or what I'm going to need to defend myself."

B.

We proceed to examine the purported suppression of the warehouse documents. Our analysis focuses on three overarching considerations: (1) the respective knowledge of the parties; (2) Pelullo's access to the warehouse documents; and (3) the government's representations. We address each of these factors *seriatim*.

1.

There is no dispute here that Pelullo had knowledge of the existence of the warehouse documents. As we previously indicated, these were Pelullo's *own* documents, generated during a twenty-year span involving virtually all of Pelullo's myriad companies and business ventures. Pelullo was well-aware that the warehouse documents were in Florida, and that members of the New Jersey prosecution team in this case did not actually possess those documents. Additionally, Pelullo received 75,000 pounds of the warehouse documents long before trial, thereby providing him with additional insight about what he could expect to find from a thorough review of

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> whose many fraudulent schemes created a number of mountainous piles of documents in several jurisdictions, could escape conviction because, as a practical matter, no United States Attorney's Office prosecuting one of the frauds could put its hands on every single possibly relevant document.

United States v. *Pelullo*, Crim. No. 94-276, Civ. No. 01-124, Supplemental Appx. SA2 at 4, 17, 24 (D.N.J. Jan. 7, 2004).

the documents that the government had retained. This, therefore, is not a situation where the government failed to disclose documents unknown to the defense, about which the government had superior knowledge.[13]

What is more, there is no indication that the government had knowledge about the exculpatory nature of the warehouse documents, which distances this case from *Banks* v. *Dretke*, 540 U.S. 668, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004) and *Strickler* v. *Greene*, 527 U.S. 263, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999). In both these cases, which are heavily relied upon by Pelullo, the prosecution team had actual knowledge during trial of information that contradicted the trial testimony of crucial prosecution witnesses. *Banks*, 124 S. Ct. at 1264-65, 1273-74; *Strickler*, 527 U.S. at 273-74. Also in both cases, the prosecution had represented to the defense that it had provided access to all information possessed by the prosecution, knowing that the files that were made available to the defense did not contain the crucial impeachment information. *Banks*, 124 S. Ct. at 1273; *Strickler*, 527 U.S. at 276, 282. Unlike the state court prosecutors in *Banks* and *Strickler*, here, the government was unaware of any material information in those documents.[14] *See United States* v. *Joseph*, 28 V.I. 438, 996 F.2d 36, 39 (3d Cir. 1993) (noting that the more difficult *Brady* situation is where certain

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[13] *See United States* v. *Dixon*, 132 F.3d at 199 (government did not suppress appellant's financial records, which the government seized while executing a search warrant, because information about appellant's own finances was known or "should have been known" to him through exercise of due diligence); *United States* v. *Aubin*, 87 F.3d 141, 148 (5th Cir. 1996) (government did not suppress information regarding loans for which appellant or companies he controlled was borrower, since "this is information about which [appellant] should have known [through the exercise of due diligence]").

[14] The District Court stated that it found "no evidence that the government knowingly used false evidence."

exculpatory evidence is available to the prosecution but not within its actual knowledge).

2.

A further consideration here, which is perhaps of even greater import, is that the government repeatedly made the warehouse documents available to Pelullo and his attorneys for inspection and copying.[15] *Brady* and its progeny permit the government to make information within its control available for inspection by the defense, and impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed. *See United States* v. *Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997) (where government gave defense access to 500,000 pages of documents, no obligation arose under *Brady* to "point the defense to specific documents within a larger mass of material that it has already turned over"); *United States* v. *Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996) ("*Brady* [does not] require[] the Government to carry the burden of transcribing [65 hours of intercepted conversations]" because the defendants "had been given the same opportunity as the government to discover the identified

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[15] Pelullo asserts that the government knew that he could not afford to pay the expenses for the warehouse documents. He thus argues that offering to provide an incarcerated and impecunious defendant with copies of thousands of documents at his expense hardly satisfies the government's *Brady* obligations. This argument is wholly unpersuasive. As the government points out, Pelullo could have sought reimbursement under the Criminal Justice Act for the expenses of obtaining the documents. See *United States* v. *Feldman*, 788 F.2d 625, 626 (9th Cir. 1986). In addition, Pelullo never informed the government or the District Court that he could not obtain the documents due to financial constraints, thus rendering this argument on appeal unavailable. In any event, his putative financial inability to obtain copies of the warehouse documents does not explain why he (or his attorney) did not accept the government's alternative offer in making the documents available for an on-site inspection.

documents" and "information the defendants seek is available to them through the exercise of reasonable diligence") (internal quotations and citation omitted); *see also United States* v. *Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997).

As in *Mmahat* and *Parks*, the government in this case made the warehouse documents available to the defense, without specifying any particular documents that were helpful to the defense, something *Brady* does not obligate it to do. In such circumstances, the burden is on the defendant to exercise reasonable diligence.[16]

3.

Conceptually, we find ourselves at the intersection between two particular branches of the *Brady* doctrine. Our jurisprudence has made clear that *Brady* does not compel the government "'to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself. "'*Starusko*, 729 F.2d at 262 (quoting *United States* v. *Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979)); *see also United States* v. *Dansker*, 565 F.2d 1262, 1265 (3d Cir. 1977). It is equally clear, however, that defense counsel's knowledge of, and access to, evidence may be effectively nullified when a prosecutor misleads the defense into believing the evidence will not be favorable to the defendant. *See, e.g.*, *United States* v. *Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986) (finding suppression where government appraised defense counsel of the existence of certain tapes but also stated that those tapes would be of "no value"); *Hughes* v. *Hopper*, 629 F.2d 1036, 1039 (5th Cir. 1980). At issue, then, is whether the representations made by the various government attorneys compel a finding of suppression, where

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[16] It bears repeating that the government had returned 75,000 pounds of documents to Pelullo. These documents were in his possession throughout the relevant time period. Pelullo's *Brady* argument pertains instead to the roughly 160 boxes and 36 file cabinets of warehouse records which were retained by the government, but which were available to Pelullo for his inspection.

every other pertinent consideration-*i.e.*, (1) the mountainous piles of documents, which belonged to Pelullo, (2) the government's lack of specific knowledge about the existence of favorable, material evidence, and (3) defendant's extended access to, and purported knowledge of, particular documents-weighs against such a finding.

Pelullo argues that the *Brady* doctrine is premised upon the appropriateness of the court and defense counsel relying upon the government's representations. The difficulty with Pelullo's argument is that there does not appear to be any such reliance in this case, notwithstanding the government's (in many instances, equivocal) assurances. With respect to the pre-1996 representations, the record establishes that neither Pelullo nor Mr. Plaza relied on the government's statements that the warehouse documents contained no relevant documents. To the contrary, while acting *pro se*, Pelullo emphasized that:

> they have taken the position that they have six boxes of material and that is all that's relevant to the case. That may be true as to their case, but that's not true as to my case. I'm the one that should determine what's relevant or what I'm going to need to defend myself.

At that time, Pelullo also asked for a continuance of several months "to get [the warehouse documents], review them," and otherwise prepare for trial. That was Pelullo's position for the twelve months between December 1994 and December 1995 while he was proceeding *pro se*, with Mr. Plaza serving as stand-by counsel.

During this relevant time span, the government's last representation occurred in March 28, 1995, when Mr. Rufolo reiterated the government's position that the warehouse documents were "not relevant to this case." This representation, however, was followed by an April 27, 1995 letter from Pelullo to the District Court requesting a continuance to obtain and review documents. Pelullo assured

the court that "Mr. Plaza, Esquire is coordinating the efforts to obtain the documents currently held by Kathleen O'Malley, AUSA in Jacksonville, Florida." It follows that any assurances by the government occurring before this April 27, 1995 letter could not have induced reliance by Pelullo.

In addition, after Mr. Plaza was elevated from stand-by to full counsel in December 1995, he made it clear that he was not relying upon the six boxes of documents produced by the government. Given Mr. Plaza's successful request to further delay the trial in order to permit him to review the multitudinous documents possibly relevant to this case, including the warehouse documents, any claim of reliance based on any prior representations by the government must be rejected as fanciful.[17] The District Court's finding to the contrary is contradicted by the record, and must be held to be clearly erroneous. However, this does not end the inquiry.

Pelullo also relies on certain post-1996 statements by the government. Mr. Plaza represented Pelullo from December 1995 until the eve of trial in September of 1996, when Pelullo convinced the District Court to replace him with Mr. Beigel as court-appointed counsel, with the assurance that the appointment of Mr. Beigel would not delay the trial. Even after Mr. Beigel was appointed, Pelullo retained the services

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[17] Pelullo argues that the transcript does not support the government's position that Mr. Plaza indicated that he would go to Florida to review the warehouse documents. Rather, according to Pelullo, it shows that Mr. Plaza intended to review 18 boxes of documents that had already been provided to him by the government, more than forty boxes that were already in Mr. Plaza's possession and which Mr. Pelullo had culled from the 75,000 pounds of documents returned after the warehouse search, and various documents he hoped to obtain from third parties. Whether or not Mr. Plaza intended to review the warehouse documents in particular, given the history of the parties' correspondence about the warehouse documents, Pelullo's contention is neither persuasive nor convincing.

of Mr. Plaza, whom the District Court directed to "remain as co-counsel for as long as Pelullo and Mr. Beigel thought he could be helpful." *Pelullo*, 961 F. Supp. at 760. Pelullo has submitted an affidavit from Beigel, alleging that he relied upon certain representations by the government that no additional *Brady* material existed in Jacksonville. As we have indicated, the government has not contested this affidavit.

However, a more careful look reveals that, as a practical matter, there could not be any genuine reliance by Pelullo on the government's statements, as there was no realistic opportunity for Mr. Beigel to review the warehouse documents during the two-week window Pelullo had left him to prepare for trial. In any event, all this merely begs the question why Pelullo and Plaza failed to review the warehouse documents during the twenty-one month span between December 1994, when Pelullo was indicted, and September 1996, when the trial began, as they repeatedly assured the District Court and the government that they would.

As the government argues, it was the twenty-one months of defense inactivity and the two-week window that Pelullo had left Mr. Beigel to prepare for trial, not any statements by the prosecution, that prevented the defense from examining the warehouse documents. The fact of the matter is that the government's post-1996 representations did not eliminate its previous offers to make the warehouse documents available to the defense, and in no way absolved the defense of its failure to exercise due diligence during the many months between indictment and trial.

We find the reasoning in two cases from the Seventh and Fifth Circuits instructive here. First, in *United States* v. *Senn*, 129 F.3d 886 (7th Cir. 1997), the Seventh Circuit held that the failure to disclose the government key witness's entire criminal record was not a *Brady* violation, notwithstanding the defense team's alleged reliance on that disclosure as complete, where defense counsel had reason to know that the

government's disclosure was not exhaustive. *Id.* at 893. The Court also noted that the ease with which the defense eventually obtained the file in question defeated their claim of suppression. *Id.* at 892-93.

In this case, too, the ease with which Pelullo discovered the relevant warehouse documents after trial would seem to defeat any claim of suppression, to say nothing with respect to his purported knowledge of the documents and their contents. Furthermore, Pelullo had reason to know, as did the defense in *Senn*, and as he more than once stated, that the government's disclosure (i.e., the six boxes of warehouse documents) was not exhaustive as to his side of the case.

Second, in *United States* v. *Mulderig*, 120 F.3d 534, the government gave the defense access to 500,000 pages of documents relating to the case. *Id.* at 541. Among the documents were two board resolutions that purportedly gave the officers the authority to negotiate and approve the loans for which they were prosecuted. The defense argued that the government violated *Brady* by (1) failing to designate two allegedly exculpatory resolutions; (2) affirmatively misrepresenting the resolutions; and (3) failing to correct false testimony as to the authority of the officers to negotiate the final terms of the loans. *Id.* The Fifth Circuit rejected the *Brady* claim, noting that Mulderig "could not have been unaware of the alleged existence of the resolutions." *Id.*[18] The Court thus concluded that "the nondiscovery of the resolutions was due to Mulderig's lack of diligence rather than any affirmative government misbehavior." *Id.*

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[18] See also *Mmahat*, 106 F.3d at 94-95 (same); *United States* v. *Runyan*, 290 F.3d 223, 245-46 (5th Cir. 2002) (where government afforded the defense full access to hard drive of seized computer, the government, in not identifying information helpful to the defense contained in the hard drive, did not suppress that information, as *Brady* does not require "the Government, rather than the defense, to turn on the computer and examine the images contained therein").

Both cases – *Senn* and *Mulderig* – stand for the proposition that defense knowledge of, or access to, purportedly exculpatory material is potentially fatal to a *Brady* claim, even where there might be some showing of governmental impropriety. Like the defendants in *Senn* and *Mulderig*, Pelullo had sufficient access to the information at issue, notwithstanding any statements of the government, which in any event were either discounted by the defense or were made so close to trial as to have no practical import.[19]

In sum, the following factors militate against a finding of suppression of the warehouse documents: (1) the massive amount of documents, which belonged to Pelullo; (2) the

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[19] Pelullo's attempts to distinguish *Senn* and *Mulderig* are unpersuasive. He argues, for instance, that in *Senn* the government had "a month before trial . . . informed the defendants that it had not contacted all local police departments, that the defendants should do so themselves, and that the discovery materials it had were extensive but not exhaustive." 129 F.3d at 892. Pelullo thus appears to ignore his own statements in this case, supported by the reality of the situation, that only he could decipher the importance of the warehouse documents to his side of the case. More importantly, the warehouse documents belonged to Pelullo, which renders the governmental conduct in this case even less blameworthy than that of the government in *Senn*.

Pelullo attempts to distinguish *Mulderig* by arguing that the prosecution there produced the documents in question, in contrast to this case, where the prosecution concealed them in the Florida warehouse. This argument entirely misses the critical distinguishing fact between the two cases-the government in *Mulderig* had specific knowledge about the location and exculpatory nature of the board resolutions but nonetheless failed to designate the resolutions as exculpatory in response to a *Brady* request. Because the government in this case *had no knowledge of the exculpatory material contained in the warehouse documents*, its affirmative representations are far less susceptible of reliance than the governmental silence found insufficient to support a *Brady* violation in *Mulderig*.

government's lack of knowledge as to the exculpatory nature of the material contained in the warehouse documents; (3) the defense knowledge of, and access to, the subject documents. The government's representations-the only factor weighing in favor of suppression-do not, under the circumstances, negate Pelullo's duty to exercise reasonable diligence.

We hold that the District Court clearly erred in its findings of fact and that there was no suppression of the warehouse documents.

C.

The District Court also found that the government suppressed the PWBA documents, on the ground that the government's *Brady* obligations extended to the content of those files because "this material was in the files of the same agency, the DOL, that prepared the present case for trial." Because we reject the District Court's conclusion that the PWBA should be considered part of the "prosecution team," we conclude the government did not suppress the PWBA documents.

Brady places an affirmative obligation on prosecutors "to learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles* v. *Whitley*, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995). That said, "*Kyles* cannot 'be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue.'" *United States* v. *Merlino*, 349 F.3d 144, 154 (3d Cir. 2003) (quoting *United States* v. *Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) and citing *United States* v. *Locascio*, 6 F.3d 924, 949-50 (2d Cir. 1993)). Here, there is no question that certain DOL agents were integral members of the prosecution team. Pelullo argues that this compels the conclusion that the PWBA (as part of the DOL) was part of the prosecution team as well, thus extending the government's *Brady* obligations to information possessed by the PWBA. The government argues

that the prosecution team should not be defined to include the entire DOL, a massive federal agency. The question presented, then, is whether the PWBA officials who possessed the documents at issue were members of the "prosecution team" in this case.[20]

We addressed an analogous situation on direct appeal in this very case. There, Pelullo contended that the government took an inconsistent position in a forfeiture proceeding in the Eastern District of Pennsylvania that was being held during Pelullo's criminal trial in New Jersey. In an unpublished opinion, we rejected Pelullo's *Brady* claim based on the foregoing, stating that there was no indication that the government affirmatively withheld the materials, as there was nothing to suggest that the New Jersey prosecutors were even aware of the Eastern District of Pennsylvania prosecutors' litigating position in the forfeiture proceeding. *See United States* v. *Pelullo*, 185 F.3d 863 (affirming Pelullo's judgment of conviction and sentence). We went on to hold that because the "government is not under an obligation to obtain and disclose all information in the possession of other arms of the government that are not involved in the particular prosecution," the prosecution was under no obligation to "ferret out evidence from another pending proceeding with a tenuous connection to the prosecution." *Id.*

Similarly, in *Merlino*, the prosecution, pursuant to defendants' request, served the Bureau of Prisons ("BOP") with a series of subpoenas, directing it to preserve and make copies of all tape-recorded conversations of certain government witnesses. 349 F.3d at 153. Subsequently, the BOP forwarded to the government roughly 300 tapes, which

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[20] Stated somewhat differently, the question is whether the prosecution should be charged with "constructive knowledge" of the evidence held by the PWBA. See *United States* v. *Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (holding that "the prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it").

the government listened to, concluding that they contained no *Brady* material. *Id.* At issue in the case was whether the government was obligated under *Brady* to review over 2,000 additional tapes held by the BOP. These tapes were never produced to, or listened to, by any member of the prosecution team. *Id.* This Court concluded that, in light of the government's representation that none of the tapes it had reviewed contained *Brady* material, the defense requests would have sent the prosecution on an "open-ended fishing expedition." *Id.* at 154 (citation omitted).

Our conclusion here is further supported by the Second Circuit's decision in *United States* v. *Locascio*, which this Court cited with approval in *Merlino* and on direct appeal in this case. In *Locascio*, the Second Circuit held that the government did not suppress impeaching information about a government witness in an organized crime prosecution in which the FBI was the lead investigatory agency. The impeaching information was memorialized in a report prepared by FBI agents who were not members of the *Locascio* prosecution team, but who were investigating other organized criminal activity involving the same witness. 6 F.3d at 949-50; *see also United States* v. *Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) ("The imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt a 'monolithic view of government' that would 'condemn the prosecution of criminal cases to a state of paralysis.'") (citation omitted); *United States* v. *Quinn*, 445 F.2d 940, 944 (2d Cir. 1971) (refusing to impute knowledge of Florida prosecutor to an AUSA in New York).[21]

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[21] In a similar vein, the Eleventh Circuit has held that the scope of a prosecutor's authority properly defines the scope of the prosecutor's disclosure obligations. Thus, in *United States* v. *Meros*, 866 F.2d 1304 (11th Cir. 1989), the Court of Appeals held that a prosecutor in the Middle District of Florida did not "possess"

Applying the general principle set forth in these cases-that the prosecution is only obligated to disclose information known to others acting on the government's behalf in a particular case-we conclude that the PWBA was not a member of the prosecution team. There is no indication that the prosecution and PWBA engaged in a joint investigation or otherwise shared labor and resources. *Cf. United States* v. *Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979) (holding that information possessed by state investigator should be imputed to federal prosecutor because "the two governments, state and federal, pooled their investigative energies [to prosecute the defendants]"). Nor is there any indication that the prosecution had any sort of control over the PWBA officials who were collecting documents. And Pelullo's arguments to the contrary notwithstanding, that other agents in the DOL participated in this investigation does not mean that the entire DOL is properly considered part of the prosecution team. Indeed, in *Locascio*, information was not attributable to the prosecution team, even though it was known to investigators drawn from the same agency as members of the prosecution

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favorable information known by prosecutors in the Northern District of Georgia and the Eastern District of Pennsylvania. *Id.* at 1309. The Court stated, "[a] prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find potentially impeaching evidence every time a criminal defendant makes a Brady request for information regarding a government witness. *Id.* Similarly, in *Moon* v. *Head*, 285 F.3d 1301 (11th Cir. 2002), the defendant based his Brady claim on certain evidence made available to him post trial regarding his alleged murder conviction. One of the State's witnesses at the sentencing phase-an agent with the Tennessee Bureau of Investigation ("TBI") – failed to reveal certain key pieces of information about the killing. The Court of Appeals, in denying the Brady claim, refused to impute to the Georgia prosecutor the evidence possessed by the TBI, as the Georgia and Tennessee agencies shared no resources or labor and the TBI agents were not under the direction or supervision of the Georgia officials. *Id.* at 1310.

team.[22] Likewise here, the PWBA civil investigators who possessed the documents at issue played no role in this criminal case.[23]

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[22] In *United States* v. *Wood*, 57 F.3d 733 (9th Cir. 1995), relied on by Pelullo, the Ninth Circuit held "only that under Brady the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute." *Id.* at 737; *see also United States* v. *Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999) (same). Both courts found the FDA part of the prosecution team because it was the "agency interested in the prosecution." 57 F.3d at 737; *see also* 175 F.3d at 577. Here, by contrast, there is nothing to suggest that the civil PWBA investigators had a similar level of involvement in the criminal prosecution, and thus the limited holdings of *Wood* and *Bhutani*, do not apply.

[23] Because the PWBA was not a part of the prosecution team, the prosecution never had "constructive possession" of the Brady materials. In *United States* v. *Joseph*, we construed "constructive possession" to mean "that although a prosecutor has no actual knowledge, he should nevertheless have known that the material at issue was in existence." 996 F.2d at 39. We there held that "where a prosecutor has no actual knowledge or cause to know of the existence of Brady material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information." *Id.* at 41. Here, there is no dispute that Pelullo never made a specific request for the PWBA documents, making this case somewhat similar to Joseph. But whereas Joseph concerned "unrelated" files, this case arguably involves related files. While that distinction certainly distances this case from Joseph, it does not compel the conclusion (advanced by Pelullo) that Joseph has no bearing on this case. Joseph concerned a prosecutor's duty to search his own unrelated files for exculpatory material. This case concerns a prosecutor's duty to search related files maintained by different offices or branches of the government. Given that the PWBA was not a member of the prosecution team, it would be

We hold that the government did not suppress the PWBA documents and that to the extent that findings of the District Court were at issue, such findings were clearly erroneous.[24]

D.

For the foregoing reasons, we hold that the District Court erred in concluding that the government suppressed the warehouse and PWBA documents. We therefore need not determine whether that information is favorable to the defense and material, or whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)) (internal quotations omitted).

VI.

Lastly, we consider Pelullo's appeal from the denial of collateral relief.[25] We must decide whether the "cause and

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accurate to say that the prosecution never had "constructive possession" of the PWBA documents.

[24] We note that, even if the prosecution is charged with knowledge, either actual or constructive, of the PWBA documents, Pelullo's *Brady* claim would still fail if he could have obtained the information through the exercise of reasonable diligence. While the public nature of these documents, generated as they were during the course of two civil actions, suggests that Pelullo had sufficient access to the documents to defeat his *Brady* claim, we need not reach that issue in light of our holding here.

[25] Pelullo filed a motion under 28 U.S.C. § 2255 advancing four grounds to vacate, set aside or correct his sentence, namely: (1) the court failed to provide the jury with specific jury unanimity instructions in violation of his Sixth Amendment rights; (2) the court misapplied the sentencing guidelines in that it sentenced defendant pursuant to U.S.S.G. § 2S1.1, which is applicable to money laundering, whereas it should have sentenced him pursuant to the embezzlement guideline, which would have produced a shorter sentence; (3) the court improperly amended defendant's judgment of conviction to include forfeiture provisions; and (4) the

actual prejudice" test articulated by the Supreme Court in *United States* v. *Frady*, 456 U.S. 152, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982), should apply to this appeal, thus procedurally barring Pelullo's collateral challenge to the jury instructions.

After noting that the second and third grounds could be dealt with later if defendant is convicted after a new trial and that the fourth ground was already addressed and rejected on defendant's motion for a judgment of acquittal, the District Court determined that the first ground, while presenting serious questions, should be rejected pursuant to *United States* v. *Frady*, 456 U.S. 152, 167, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982). The District Court thus dismissed the petition, though it granted a certificate of appealability with respect to the jury instruction issue. As we have stated, this appeal is thus limited to that one issue.

A.

Count 1 of the indictment charged a two-part conspiracy to embezzle funds and to engage in money laundering. The jury charge relating to Count 1 did not require that there be unanimity either as to the object of the conspiracy or as to the particular schemes alleged.[26] Counts 2-12 charged embezzlement, and Counts 13-54 charged money laundering.

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government failed to present sufficient evidence to support the convictions for money laundering.

[26] With respect to Count 1, the District Court charged:

> Count 1 lists two offenses as the object of the Section 371 conspiracy-theft or embezzlement of the Compton Press pension funds and money laundering. You need not find that the defendant conspired to commit both of these offenses to find the defendant guilty of the conspiracy charged in Count 1. In order to find the defendant guilty of Count 1, you must, however, unanimously agree that the defendant conspired to commit at least one of the offenses charged as an object of the conspiracy.

Each of those counts incorporated Count 1 by reference. Further, the jury charge applicable to the embezzlement offenses did not require unanimity as to whether Pelullo engaged in a) embezzling, b) stealing, c) abstracting, or d) converting pension funds.[27] The charge applicable to the money laundering counts did not require unanimity as to whether Pelullo engaged in the financial transaction a) with the intent to promote the carrying on of the specified unlawful activity or b) with knowledge that the financial transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity.[28]

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[27] The charge relating to the embezzlement counts stated:

> As you can see, the statutory language of Section 664 . . . covers a number of different sorts of takings. However, the United States is not required to prove all four means, which I have just defined for you, were actually employed by the defendant. Rather, the government's proof need only establish beyond a reasonable doubt that the defendant unlawfully and willfully either embezzled, or stole, or abstracted, or converted to his own use or the use of another the money or property of the Compton Press Employees' Profit Sharing Retirement Plan or the Compton Press Employees' Thrift Plan, as charged in the indictment.

[28] The charge relating to the laundering counts stated:

> To find the defendant guilty of money laundering, you must find that the government has proven . . . beyond a reasonable doubt, [among other things], that the defendant engaged in the financial transaction with either the intent to promote the carrying on of the specified unlawful activity, or knowledge that the financial transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity.

In his § 2255 motion, Pelullo argued that the District Court erred in failing to specifically instruct that the jurors were required to agree unanimously upon which of the offenses defendant conspired to commit (Count 1); which scheme he engaged in to embezzle from the pension plans (Counts 2-12); and which unlawful activity was the predicate act for the money laundering charges or which type of money laundering method-promotion or concealment-he employed (Counts 13-54).

In deciding the § 2255 motion, the District Court concluded that it had in fact erred in its instructions to the jury as to the conspiracy count (Count 1), and that the error was not harmless because "the jury could have arrived at a non-unanimous verdict in violation of the Sixth Amendment." Nevertheless, the District Court denied Pelullo's request for collateral relief, concluding that he had not shown the requisite cause to properly raise the error for the first time on collateral attack.[29] Pelullo now appeals that decision, alleging that the District Court's failure to provide a specific unanimity charge was constitutionally defective.

B.

The scope of our review is shaped by whether Pelullo procedurally defaulted on this issue, both at trial and on direct appeal. In *United States* v. *Frady*, the Supreme Court held that the proper standard of review for collateral attacks on trial errors, including jury instructions where no contemporaneous objection was made, is the "cause and actual prejudice" standard. 456 U.S. at 167. Under that standard, "to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from

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[29] The District Court further concluded that there was no risk of jury confusion and therefore no need for the unanimity charge as to Counts 2 through 54.

the errors of which he complains." *Id.* at 167-68. Applying *Frady* to the present case, the District Court concluded that, although Pelullo might have suffered actual prejudice from an erroneous jury instruction provided as to Count 1, he had failed to demonstrate "cause" for his procedural default at trial and again on direct appeal, thus defeating his claim for collateral relief.

Pelullo argues, however, that the "cause and actual prejudice" standard should not apply to his request for relief. He argues that his jury charge claims should be reviewed *de novo* because he effectively raised and preserved the issue at trial by requesting a specific unanimity charge. Alternatively, he contends that we should review his request under a plain error standard because he attempted to raise this issue on direct appeal. We address each contention below.

1.

Pelullo contends that he "raised this matter in the district court" because he submitted a proposed instruction that the jury must unanimously agree on which of the overt acts identified in Count 1 of the indictment (conspiracy) were committed. We disagree.

"A party generally may not assign error to a jury instruction if he fails to object before the jury retires or to 'state distinctly the matter to which that party objects and the grounds of the objection'." *Jones* v. *United States*, 527 U.S. 373, 387, 144 L. Ed. 2d 370, 119 S. Ct. 2090 (1999) (citation omitted). In *Jones*, the Supreme Court held that "a request for an instruction before the jury retires [does not] preserve an objection to the instruction actually given by the court," as "such a rule would contradict Rule 30's mandate that a party state distinctly his grounds for objection." *Id.* at 388; *see also United States* v. *Jake*, 281 F.3d 123, 131-32 (3d Cir. 2002). By merely requesting a specific unanimity charge, then, Pelullo did not properly object to the instructions. His reliance on a *de novo* standard of review is thus unavailing.

2.

Rule 52(b) of the Federal Rules of Criminal Procedure grants the courts of appeals the latitude to correct particularly egregious errors on appeal regardless of a defendant's trial default. Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); *see also United States* v. *Turcks*, 41 F.3d 893, 897 (3d Cir. 1994). However, the plain error standard is "out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal." *Frady*, 456 U.S. at 164.

Here, there is no dispute that Pelullo failed to raise the jury charge issue in his opening brief on direct appeal. What the parties do dispute is the efficacy of Pelullo's attempt to challenge the charges on direct appeal by way of supplemental brief to the Court. Pelullo's argument that *Frady* should not apply, insofar as it carries any validity, is based on one premise-that the government defeated his attempt to raise the issue on direct appeal.

When Pelullo moved to file a supplemental brief, the government opposed the motion, stating, in pertinent part:

> If this Court denies appellant's attempt to improperly add additional claims to this appeal, and appellant ultimately does not prevail in this appeal, he will not be precluded from raising these claims in a petition for relief under 28 U.S.C. § 2255 which, given the length of appellant's sentence, will inevitably follow this appeal.

This Court subsequently denied Pelullo's motion to supplement his appeal without explanation. Based on the foregoing history, Pelullo contends that the government should have been judicially estopped from relying upon this purported procedural default.

We find Pelullo's attempt to blame the government for his double procedural default unconvincing. As an initial matter, he provides no explanation for failing to raise this matter before the jury retired. He also provides no explanation for his failure to timely raise this claim on direct appeal. Pelullo filed a sixty-page Brief for Appellant, which raised eight points with twenty-seven subparts. None of those points or subparts raised his present challenge to the unanimity instructions. After the government had filed its Brief for Appellee, Pelullo filed a motion with this Court, seeking permission to file a supplemental brief to complain for the first time about the absence of a specific unanimity instruction.

It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal. *In re Surrick*, 338 F.3d 224, 237 (3d Cir. 2003) (claim that was omitted from appellant's initial brief and raised for first time in a reply brief was waived); *see also Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (noting "that under Federal Rule of Appellate Procedure 28(a)(3) and (5) and Third Circuit Local Appellate Rule 28.1(a) appellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief"). Thus, the government's representation notwithstanding, this Court, absent exceptional circumstances, will not normally permit an appellant to file a supplemental brief.[30]

By blaming the government for his procedural default, Pelullo not only ignores his failure to raise the issue both at

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[30] In his Motion for Leave to File Supplemental Brief, Pelullo argued that the complexity of the case, with its voluminous record and myriad factual and legal questions, was the reason why the jury charge issue was not previously identified (in his opening brief). No other reason was offered, and though this Court did not articulate its reasons for denying that motion, Pelullo's proffered justification was less than compelling.

trial and in his opening brief on direct appeal but also assumes that this Court denied his motion to file a supplemental brief based on the government's representation. However, the order denying Pelullo's motion is silent as to the reasons for that denial. The premise, therefore, that the government misled this Court is based on nothing but conjecture. This is particularly so in light of the independent and sufficient ground for denying the motion, to wit, the well-established rule that the failure to identify or argue an issue in an opening brief constitutes waiver of that issue on appeal. *See In re Surrick*, 338 F.3d at 237.

For this reason, moreover, Pelullo's invocation of judicial estoppel is unavailing. In *New Hampshire* v. *Maine*, 532 U.S. 742, 149 L. Ed. 2d 968, 121 S. Ct. 1808 (2001), the Supreme Court noted that:

> several factors typically inform the decision whether to apply that doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (internal quotations and citations omitted). Inasmuch as Pelullo cannot show that this Court accepted the government's representation in denying his motion to file a

supplemental brief, there is "no risk of inconsistent court determinations" and "little threat to judicial integrity." *Id.* at 751; *see also Montrose Med. Group Participating Sav. Plan* v. *Bulger*, 243 F.3d 773, 778 (3d Cir. 2001) ("Judicial estoppel's sole valid use . . . is to remedy an affront to the court's integrity."). Thus, an integral factor justifying the application of judicial estoppel is clearly absent. *See Bulger*, 243 F.3d at 778 (holding that judicial estoppel is not appropriate where "the initial claim was never accepted or adopted by a court or agency").[31]

Accordingly, we reject Pelullo's attempt to insulate his collateral attack on the jury charges from the strictures of *Frady*, and we hold that the proper standard of review is the "cause and actual prejudice" test.

C.

Having determined that the proper standard of review for Pelullo's motion is the "cause and actual prejudice" test enunciated in *Frady*, the question becomes whether the District Court correctly applied this dual standard in dismissing Pelullo's petition.

Under the first prong of the *Frady* test, a defendant must show cause existed for the double procedural default, i.e. failure to raise the issue at trial and on appeal. To establish "cause" for procedural default, a defendant must show that "'some objective factor external to the defense impeded counsel's efforts' to raise the claim." *McCleskey* v. *Zant*, 499 U.S. 467, 493, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)); *see also Wise* v. *Fulcomer*, 958 F.2d 30, 34 (3d Cir. 1992). "Examples of external

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[31] In addition, it is not entirely clear that the government's positions are necessarily inconsistent. Pelullo could in fact raise his objection to the jury charges in a § 2255 motion, as the government indicated, though he then faced, in *Frady*, a significantly higher hurdle than would exist on direct appeal.

impediments which have been found to constitute cause in the procedural default context include 'interference by officials,' 'a showing that the factual or legal basis for a claim was not reasonably available to counsel,' and 'ineffective assistance of counsel.'" *Wise*, 958 F.2d at 34 n.9 (quoting *McCleskey*, 499 U.S. at 494).

Here, Pelullo offers no excuse for his failure to raise this issue at trial or in his opening brief on direct appeal. His sole contention is that cause exists for his failure to raise the issue on direct appeal based on the government's representation in opposing his motion to file a supplemental brief. This contention is insufficient for the reasons set forth above. As such, the District Court correctly determined that Pelullo failed to establish cause for his double procedural default.

Because Pelullo failed to establish the requisite cause excusing procedural default, it is unnecessary to determine whether Pelullo has shown actual prejudice. *See United States* v. *Griffin*, 765 F.2d 677, 682 (7th Cir. 1985).

D.

The District Court properly dismissed Pelullo's § 2255 petition pursuant to *United States* v. *Frady*, 456 U.S. 152, 71 L. Ed. 2d 816, 102 S. Ct. 1584. We will therefore affirm the District Court's denial of relief under 28 U.S.C. § 2255.

VII.

For the foregoing reasons, we will reverse the District Court's grant of a new trial, and we will direct the District Court to reinstate Pelullo's judgment of conviction and sentence. We will also affirm the District Court's denial of collateral relief. In addition, we will remand the matter to the District Court for resolution of the remaining issues raised in Pelullo's § 2255 motion, and direct that the District Court, as a priority matter, give serious consideration to vacating its Order of January 29, 2002, which had released Pelullo on bail.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA
Plaintiff,
v.
LEANARD A. PELULLO
Defendants.

Criminal No. 94-276 (DRD)
Civil Action No. 01-124 (DRD)

ORDER

Defendant, Leonard A. Pelullo, having moved for a new trial pursuant to Fed. R. Civ. P. 33 and having moved for relief pursuant to 28 U.S.C. §2255; and the court having held hearings on these motions and having reviewed the submissions of the defendant and the government; and for the reasons set forth in the court's opinion of even date:

IT is his 17th day of May 2002;

ORDERED as follows:

1. Defendant's motion for a new trial is granted solely on the ground that the government failed to comply with its obligations under *Brady* v. Maryland, 373 U.S. 83(1963).

2. Defendant's motion for relief pursuant to 28 U.S.C. §2255 is dismissed.

3. The court having found that as to the §2255 issues relating to the failure to give a unanimity charge the defendant has made a substantial showing of the denial of constitutional right, a certificate of appealability will issue.

_____
DICKINSON R. DEBEVOISE
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA **Plaintiff,** **v.** **LEANARD A. PELULLO** **Defendants.**	**Criminal No. 94-276 (DRD)** **Civil Action No. 01-124 (DRD)** **OPINION**

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Debevoise, Senior United States District Judge

In November 1995, a jury found defendant Leonard A. Pelullo guilty on an indictment which charged conspiracy to commit embezzlement and engage in money laundering (Count 1), embezzlement (Counts 2-12) and money laundering (Counts 13-54). On December 8, 1997, the court sentenced defendant to concurrent terms of 210 months imprisonment (to be served concurrently with a sentence defendant was serving on a conviction in the United States District Court for the Eastern District of Pennsylvania). Defendant moved for post trial relief on many grounds, including the contention that the government had suppressed favorable evidence. The court denied the motion. United States v. Pelullo, 971 F. Supp. 159 (D.N.J. 1997), United States v. Pelullo, 951 F. Supp. 736 (D.N.J. 1997). The Court of Appeals affirmed defendant's conviction on June 15, 1999, United States v. Pelullo, 185 F. 3d 863 (3d Cir. 1999) (Table) and denied rehearing en banc on August 23, 1999. The Supreme Court denied defendant's petition for certiorari on January 10, 2000. Pelullo v. United States, 528 U.S. 1081 (2000).

During the two and one-half years after the Court of Appeals rendered its, decision defendant a series of orations and a petition for relief pursuant to 28 U.S.C. §2255. For a full understanding of the motions and of the discussion that follows it would be helpful to read the detailed description of

the case set forth in the court's opinion in U.S. v. Pelullo, 961 F. Supp. 736 (D.N.J. 1997).

I. The Motions and §2255 Petition.

a. Motion far New Trial:

In November 1999 defendant filed a tri-partite motion for a new trial pursuant to Fed. R. Crim. P. 33. Each part developed one aspect of defendant's contention that newly discovered evidence disclosed that the government had suppressed and failed to disclose favorable evidence in violation of its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and had elicited perjured testimony and argued from false evidence to the jury at defendant's trial.

The first part of the 1999 motion for a new trial relies primarily upon evidence that the federal prosecutor produced for defendant in connection with the recently abandoned prosecution against defendant in the Middle District of Florida. These documents, according to defendant, cast doubt upon the four charges of fraud upon Compton Press and the Compton Press Pension Plans: i) the ATTS transaction, ii) the Granada - DWG transfers, iii) the UNUM insurance liquidation, and iv) looting Compton Press itself.

The second part of the 1999 motion for a new trial reties primarily upon documents derived from the two civil cases involving prior associates of defendant many of wham were witnesses against him in the trial of the instant case. One of these cases was instituted in 1993 in the United Spites District Court for the Southern District of Florida by Fred and Murray Schwartz against attorney Kenneth Falk, his law firm (Wilentz, Goldman & Spitzer) as well as against Mosha Milstein, David Hellhake and Media Partners, Inc., all of whom figured prominently in defendant's trial. In the second civil suit Congregation Chevra Shas, Moshe Milstein and Alan Weisberger sued Falk and Wilentz, Goldman & Spitzer in the New York State Supreme Court. The suit was commenced on December 11, 1995; defendant was aware of

it, but depositions were not taken until 1998, two years after defendant's trial.

Defendant contends that evidence derived from these two suits demonstrates that government witnesses lied when they testified that defendant was the mastermind controlling a myriad of transactions and directing others who acted only at his behest. This new evidence, according to defendant, shows that the government witnesses acted without defendant's involvement in contradiction to their trial testimony, i) that defendant directed Falk with regard to the disbursement of the National Media litigation settlement proceeds, ii) that defendant, with the Hellhake investment group fronting for him, sought to obtain a 70% equity interest in ATTS, and iii) that defendant had directed attorney Falk to write a letter that falsely stated that a $400,000 debt owed to the pension funds had been repaid.

The third part of the 1999 motion for a new trial relies primarily upon depositions and documents that defendant obtained from the Department of Labor (DOL) pursuant to an order of the court and documents obtained from the DOL pursuant to a Freedom of Information Act (FOIA) request. The depositions were of David Hellhake taken in a Florida bankruptcy-matter; In re Ocean Properties of Delaware Inc., S.D.Fla. Case No. 90-11919 BRC-SM and of David Hellhake's father, George P. Hellhake taken in the same matter. In addition defendant relies upon the newly discovered letter dated August 30, 1989 to Douglas Miller of Shearson Lehman authorizing the transfer of the pension plan's account to A.G. Edwards. The letter was signed by Coolidge Marqueen, one of Compton Press's former owners, as well as by Corona and David Hellhake. Further defendant relies upon the newly produced report of Gus R. Lesnevich, an expert forensic document examiner who had examined seven of the original Granada Investment Inc. loan documents and concluded that the signatures of Andrew N. Heine on each of these documents were genuine.

These documents, according to defendant, contradict the government's contentions and the testimony of its witnesses i) concerning the relationship of David and George Hellhake to GH Enterprises, the role of GH Enterprises in the DWG transaction and George Hellhake's role in the ATTS transaction, ii) that Gerardi and Marqueen had not been aware of the transfer of pension funds to acquire the DWG stock and iii) that Heine had not signed loan instruments in connection with the DWG stock acquisition.

b. Breach of Attorney-Client Privilege:

Also in November 1999 defendant relied upon a variety of newly discovered documents to support a reversal of the court's prior ruling that the government had not violated his attorney-client privilege by reviewing telephone conversations he had had with attorneys when confined at FCI Fairton between June and November 1995 and by reviewing privileged documents stored in the Florida warehouse.

Prior to trial the court rejected defendant's claim that the government had violated his Sixth Amendment rights during the examination of the Florida warehouse documents, finding that "none of the agents or government attorneys working on this case were exposed to the privileged documents." United States v. Pelullo, 917 F. Supp. 1065, 1080 (D.N.J. 1995). In his initial motion for a new trial defendant raised the privilege question again after learning that the United States Attorney's Office in the Eastern District of Pennsylvania used grand jury subpoenas to obtain tape recordings of defendant's telephone conversations while he was imprisoned at the Federal Correctional Institution at Fairton. The court rejected defendant's claim, finding that there was no evidence that the prosecutors either in the Eastern District of Pennsylvania. or this district "had possession of any recorded conversations between Pelullo and any of his attorneys." 971 F. Supp. at 161

On a motion for reconsideration defendant established that the prosecutors in the Eastern District had .access to transcripts of defendant's conversations with counsel, but the court rejected defendant's application on the ground that defendant had no expectation of privacy in his prison conversations because the calls had been "knowingly made in the presence of the Bureau of Prisons through its taping and monitoring procedures." United States v. Pelullo, 5 F. Supp. 2d 285, 289 (D.N.J. 1998). The Court of Appeals upheld this ruling, United States v. Pelullo, Case Nos. 97-5795, etc. (3d Cir. June 15, 1999), and also ruled on defendant's appeal from an order of the Eastern District of Pennsylvania denying his petition for disclosure of tape recordings, holding that defendant had waived the privilege by making telephone calls while incarcerated at FCI Fairton without a "reasonable expectation of confidentiality." In re Grand Jury Proceedings, Case No. 98-1804 (3d Cir. June 8, 1999).

Defendant has produced several newly discovered documents that he claims undercut each of the adverse determinations against him.

An affidavit executed by Assistant United States Attorney Ronald G. Cole of the Eastern District discloses that FCI Fairton made 1100 of defendant's telephone calls available to government investigators; an FBI agent and later a paralegal listened to defendant's conversations as the calls were being recorded; these calls included conversations between defendant and attorneys; the contents of at least one attorney conversation was discussed with AUSA Rufolo who is prosecuting the instant case. One of the intercepted telephone numbers was that of Joseph Fioravanti, Esq., who represented defendant in his second trial in the Eastern District of Pennsylvania. The Court of Appeals denied the defendant's motion to supplement the record to include this newly discovered evidence, stating:

> From the record before this court, no call to an attorney of record for Pelullo in this case was recorded or transcribed.
>
> Therefore, we can conclude that the only phone call that the Eastern District prosecutors shared with the New Jersey prosecutors was the one that Pelullo had made to Heine. That phone call was introduced in the forfeiture action to support the existence of a Heine-Pelullo conspiracy to defeat the government's interest in parcels of real property. Heine, though an attorney, was not, of course, representing Pelullo in the New Jersey prosecution. Accordingly, we agree with the District Court that there was no Sixth Amendment violation because the Eastern District of Pennsylvania prosecutors did not share with the New Jersey prosecutors tapes of conversations that contained information protected by the Sixth Amendment. We have previously explained that there is a Sixth Amendment violation by the "government's deliberate intrusion into a defendant's attorney-client relationship in order to gain access to confidential defense strategy." *United Sates v. Voigt*, 89 F.3d 1050, 1071 (3d Cir. 1996). Here, there has been no showing of such deliberate intrusion.

Defendant further relies on a Department of Justice Inspector General's Report which found that "the BOP's limited attempts to monitor inmate calls are virtually useless in preventing inmates from committing crimes using telephones" because "only 3.5 percent of the tens of thousands of calls made each day from BOP facilities are monitored." According to the report at FCI Fairton only 1.6% of inmate calls are monitored "live" and no recorded calls are monitored by the prison staff. According to defendant this lack of monitoring undermines any privilege waiver argument

and the contention that defendant did not have a reasonable expectation of confidentiality.

The final item of newly discovered evidence relating to the attorney-client privilege claim concerns the documents in the Florida warehouse. The government had seized 904 boxes, 124 file cabinets and 10 file cabinet drawers. After separating the documents considered pertinent to their investigation the FBI returned approximately 75,000 pounds of documents to defendant and inventoried the remaining 160 boxes and 36 file cabinets. Agents from Newark traveled to Florida in the Fall of 1991, conferred with Special Agent Wood of the FBI who had inventoried the documents and brought back to Newark six boxes of original document relating to the Compton Press financial dealings which are the subject of this case. Defendant contended that his attorney-client privilege had been violated because during their review of these document government agents were exposed to confidential attorney-client communications. After a hearing the court found that none of the government attorneys working on the case were exposed to privileged documents and that "[e]ven if it were concluded that one or more of the documents which Pelullo has produced is entitled to the protection of the attorney-client privilege, there has been absolutely no showing of prejudice." United States v. Pelullo 917 F. Supp. 1065, 1080 (D.N.J. 1995).

In October 1999 the prosecutors in the Middle District of Florida provided defendant's counsel with the six boxes of documents that had originally been taken to Newark for use in this case and then returned to the Florida authorities. The new evidence upon which defendant relies is a handwritten inventory dated February 24-26, 1993 identifying the documents seized by the Newark agents from defendant's boxes. The inventory identifies the sources of the documents (the cabinet or box by number designation from which each document was seized) and the number of the "Newark Box" into which each document was placed for the Newark prosecution.

It is defendant's contention that this newly discovered inventory disclosing the source of the documents establishes that in their search the Newark agents went through boxes seized from defendant that contained attorney-client information. This is information that was not available to the court when it made its other rulings concerning the attorney-client privilege question.

c. Discovery Motions:

Defendant filed several motions seeking additional discovery and production of documents. The court granted these motions in part; it denied them in part; all have now been disposed of, and the pending substantive motions will be disposed of on the present record.

Defendant also moved for release from custody pending disposition of the motions. In view of the serious challenges he raises and in view of the lengthy time it is taking to assemble the evidence and decide the motions, the motion for release was granted.

d. Motion Pursuant to 28 U.S.C. §2255:

Defendant has moved for relief on a number of grounds pursuant to 28 U.S.C. §2255. The first ground defendant advances for relief is that the jury was not instructed to agree unanimously upon which acts and which schemes formed the basis of defendant's convictions. All of the charges in the indictment arose out of one or more of the transactions previously referred to: 1) loans from the Compton Press retirement fund to Granada Investments, Inc.; 2) loans from the Compton Press retirement fund accounts to ATTS; 3) transfer of proceeds of the Compton Press retirement fund UNUM annuity to other corporations, and 4) the looting of Compton Press itself.

Count 1 of the indictment charged two objects of the conspiracy. First, it alleged that defendant "knowingly and wilfully did combine, conspire, confederate and agree with Raul Corona and others, to . . . embezzle, steal and unlawfully and wilfully abstract and convert" approximately $4,176,000

in assets of the Compton Press Employees' Profit Sharing Retirement Plan, an employee pension benefit plan, the Compton Press Employees' Thrift Plan, an employee pension benefit plan, and the assets of Compton Press itself, contrary to the provisions of 18 U.S.C. §664. Second, the conspiracy count also alleged that defendant and Corona conducted financial transactions with the intent of promoting or carrying on unlawful activity or to disguise the nature of the proceeds in violation of 18 U.S.C. §1956(a)(1). In other words, Count 1 charged a two prong conspiracy - an embezzlement conspiracy and a money laundering conspiracy.

With respect to Count 1 the court charged:

> Count 1 lists two offenses as the object of the Section 317 conspiracy - theft or embezzlement of the Compton Press pension funds and money laundering. You need not find that the defendant conspired to commit both of these offenses to find the defendant guilty of the conspiracy charged in Count 1. In order to find the defendant guilty of Count 1, you must, however, unanimously agree that the defendant conspired to commit at least one of the offenses charged as an object of the conspiracy. (emphasis added)

It is defendant's contention that this charge is fatally flawed because it did not advise the jurors that they must agree unanimously on which of the objects defendant was guilty. Further, there was a failure to instruct the jury that it must unanimously agree as to each of the four schemes defendant was alleged to have engaged in as a co-conspirator.

It is defendant's contention that the jury charge was equally defective with respect to Counts Two through Twelve and Counts Thirteen through Fifty-four. Apart from incorporating Count 1 by reference, Counts 2 through 12 allege that defendant engaged in 1) embezzling, 2) stealing, 3) abstracting or 4) converting pension benefit funds through a series of fund transfers. The court charged:

> As you can see, the statutory language of Section 664 . . . covers a number of different sorts of takings. However, the United States is not required to prove all four means, which I have just defined for you, were actually employed by the defendant. Rather, the government's proof need only establish beyond a reasonable doubt that the defendant unlawfully and wilfully either embezzled, or stole, or abstracted or converted to his own use or the use of another the money or property of the Compton Press Employees' Profit Sharing Retirement Plan or the Compton Press Employees' Thrift Plan, as charged in the indictment. (emphasis added)

Defendant asserts that the same constitutional infirmity attaches to this charge because it did not instruct the jury that it was required to agree unanimously on which method defendant employed to obtain funds from Compton Press or its retirement accounts.

It is defendant's contention that Counts 13 through 54 suffer from the same defect. Each incorporates Count 1 and then charges that defendant laundered funds either with the intent to promote some specified unlawful activity or with the knowledge that the laundering would conceal the proceeds of some unlawful activity. The pertinent charge read:

> [T]o find the defendant guilty of money laundering, you must find that the government has proven . . . beyond a reasonable doubt, [among other things], [t]hat the defendant engaged in the financial transaction with either the intent to promote the carrying on of the specified unlawful activity, or knowledge that the financial transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity.

Again defendant challenges this charge on the ground that it did not instruct the jury of its obligation to decide unanimously on which unlawful activity constituted the money laundering promotion or concealment - defendant employed.

Defendant's next challenge to his conviction is his claim that the court misapplied the Sentencing Guidelines when imposing sentence. Essentially he argues that because his conduct - primarily consisting of alleged acts of embezzlement - fell outside the heartland of the money laundering guideline, the court should have sentenced defendant under the embezzlement guideline, which would have resulted in a shorter term of imprisonment.

The next ground advanced in defendant's §2255 motion is that the government did not present sufficient evidence to support the convictions for money laundering.

Finally, defendant contends that the court improperly amended his judgment of conviction to include the forfeiture provisions.

II. Discussion

At the outset, I find no evidence that the government knowingly used false evidence. However, the disclosures subsequent to trial of documents from the Florida warehouse and from the Department of Labor's own files evidence such a serious violation of the government's *Brady* obligations that defendant's motion for a new trial must be granted on that ground alone. In light of this conclusion it is unnecessary to determine whether new evidence derived from the civil litigation that Fred and Murray Schwartz instituted against Kenneth Falk and his law firm and from the civil litigation that The Congregation Chevra Shas and others brought against Falk and his firm requires a new trial.

Defendant has not established that he is entitled to a new trial by reason of the government's invasion of his attorney-client privilege.

Defendant's §2255 petition will be dismissed with a certificate of appealability. His contention that the failure to give a more specific unanimity charge with respect to Count I has merit, but his failure to raise that issue at trial or in a timely manner on appeal precludes him from raising it now. His contention that a more specific unanimity charge was required with respect to Counts 2-12 and Counts 13-54 is without merit. The other grounds advanced in his §2255 petition are either without merit or else need not be addressed because they can be considered if defendant is convicted after a new trial.

a. Brady Viglations

Where, as here, newly discovered evidence was in the possession of the government and should have 1:)been disclosed under Brady, Fed. R. Crim. P. 33 is properly invoked to raise the Brady claim. United States v. Dansker, 565 F.2d 1262, 1263 and n.2 (3d Cir. 1977), cert. dismissed, 434 U.S. 1052. There are three components of a Brady violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, ____ U.S. ____, 119 S. Ct. 1936, 1948 (1999). As stated in Kyles v. Whitley 514 U.S. U.S. 419, 433 (1995):

> [F]avorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

In other words, it must be determined whether the suppressed evidence, "when viewed as a whole and in light of the substance of the prosecution's case" is such that the government's suppression of that evidence led to "an

untrustworthy guilty verdict." United States v. Pelullo, 105 F.3d 117, 123 (3d Cir. 1997).

A critical issue, both with respect to the embezzlement and money laundering charges as well as the conspiracy charge, was defendant's intent. The government sought to prove its version of each of the critical transactions; defendant proffered a different version of these transactions. Even accepting defendant's version the government could have urged persuasively that there was a criminal intent. Nevertheless, defendant was entitled to present to the jury all available evidence that supported his version and that impeached the government's witnesses. This he did not have the opportunity to do in large part because the government failed to provide him with exculpatory and impeaching information in its possession.

This evidence existed in two places – the Florida warehouse and the Department of Labor's ("DOL") civil investigatory arm. The biggest cache of documents was the huge collection maintained under government control in the Florida warehouse. Even after the FBI had returned to defendant 75,000 pounds of these documents there remained 160 boxes and 36 file cabinets of documents.

The government argues that the documents in the Florida warehouse cannot be deemed to have been suppressed because defendant had access to them before trial or by the exercise of reasonable diligence could have had access. United States v. White, 970 F. 2d 328, 337 (7th Cir. 1992). This argument ignores the reality of the situation and it ignores the representations that government counsel repeatedly made to the court and to defense counsel that the six boxes of documents that the government extracted from the mass of documents in the Florida warehouse contained everything relevant to defendant's case and that the remaining documents "are not relevant to this case."

The Florida warehouse documents as well as the DOL collection of documents were within the government's

custody and control. It now appears that the government did not think to examine the DOL file relating to the civil investigation in this case. The government reviewed the vast array of Florida warehouse documents with sufficient dedication and care to extract six boxes of documents enabling it to put together and present with great skill a complex case with such clarity that the jury was able to comprehend the intricate financial transactions in which defendant and his cohorts engaged. Unfortunately the government's search of its own records and the records under its control was inadequate to produce documents which cast doubt upon its theory of defendant's role in the various transactions and upon critical testimony of its witnesses.

The government contends that since the records were defendant's own records, he should have known what was in them and should have made his own examination. Defendant was in jail and obviously could not have made his own examination; it would be fanciful to expect that he would remember in detail the contents of an enormous body of documents assembled in a warehouse. His assigned counsel and, shortly before trial, his retained counsel were faced with the practical problem of an impending trial and were entitled to rely on the government's assurances that it had reviewed the warehouse documents and that there was no relevant material there other than that which was contained in the six boxes brought back to Newark.

The first indication that the government's assurances were incorrect occurred after the trial in this case when defendant's paralegal examined documents in connection with another proceeding in which defendant was involved. The inaccuracy of the government assurances was firmly established when the United States Attorney's Office in Florida delivered to defendant documents taken from the warehouse. Included were documents that are exonerating and/or impeaching.

A description of representative items of Brady material follow:

At trial the government relied heavily upon the testimony of Fred Schwartz with regard to the ATTS transaction. Swartz testified that he never signed a commitment letter for the ATTS loan from Compton Press. At trial the government introduced an unsigned commitment letter. Among the Florida warehouse documents there was an executed copy of the September 19, 1999 commitment letter (D Ex. 4). The government argues that because there are differences between its trial exhibit and the newly produced document, Schwartz's testimony was literally true, and that the formal loan documents, which were not signed until after the transfer of the Pension Funds, were the critical papers. The government might well be able to advance these arguments to a jury, but defendant should have been able to confront Schwartz (and answer the government's closing argument) with D Ex. 4.

At trial Fred Schwartz testified that for an investment of $700,000 defendant was to have acquired the right to obtain a 70% interest in ATTS. It was defendant's contention at trial that he simply arranged for a bridge loan of $1,000,000 and that he had no interest in ATTS. Among the warehouse documents produced to defendant after the trial were draft organizational resolutions prepared by the Adorno Zeder law firm (D Exh 13) referring to a $1,000,000 loan from defendant's investor group, Murray Schwartz's January 4, 1990 representation letter to ATTS's accountants (D Exh 11) referring to Murray Schwartz as ATTS's sole shareholder and handwritten notes of Bonnie Lynn dated November 27, 1989 (D Exh 15) which were confirmatory of the organizational resolutions and the representation letter. Defendant should have had these documents to challenge Schwartz's testimony and the government's contentions about his interest in ATTS.

At trial Fred Schwartz testified that he did not know who were the investors in Ambassador Travel. This testimony at least can be challenged by the draft organizational resolution, Schwartz's own September 7, 1989 letter to Bonnie Lynn (D

Exh 17), and correspondence between Schwartz and Robert L. Roth, Esq., (D Exh 18 and 19) which show that Schwartz was aware of every deposit into his firm's trust account. It is true that the government can argue about the significance and meaning of these exhibits, as it does in its opposition papers to these motions, but defendant was entitled to produce this material so that the jury could have the benefit of hearing the position of each party and consider the evidence supporting those positions.

It was the government's contention, developed through the testimony of Fred Schwartz and Bonnie Lynn, that defendant owed money to ATTS. Among the documents in the Florida warehouse was an accounting printout reflecting intercompany transactions between ATTS and defendant's companies in 1990 (D Exh 21). The document reflects that in excess of $600,000 was loaned by defendant's entities to ATTS and that a balance of $322,127.72 was due to them as of September 21, 1990.

Further, a packet of receipts and cancelled checks in the amount $46,591.67 was attached to a December 11, 1989 memorandum to Bonnie Lynn which recites that "[p]ursuant to Mr. Pelullo's request, enclosed please find payment for all the travel tickets that Away to Travel-South has issued from September, 1989 to December 1, 1989." This material was relevant to discredit Schwartz's testimony that defendant owed money to ATTS and to the government's contention that defendant's entities used ATTS and ran up bills. It may also support the government's argument that it shows that defendant dealt with ATTS just like any one of his companies - freely transferring money in and out whenever needed. That contention, however, does not avoid the conclusion that this evidence could have been used by defendant to counter Schwartz's and Bonnie Lynn's testimony and to refute significant government contentions.

Fred Schwartz testified that a list of ATTS expenditures in September and October 1989 (Gx 260) was in defendant's

handwriting and that he (Schwartz) did not accept it as truthful. Among the documents produced in Florida post trial is a facsimile transmission from ATTS's chief financial officer to an Adorno Zeder attorney of Manny Ferro's notes (reflecting distributions identical to those reflected in Gx 260), with the notation that Ferro's source for the calculations was none other than Fred Schwartz (D Exh 8). The government does not now dispute that: attributing the notes to defendant was incorrect, but again that was something that defendant was entitled to establish at trial through use of D Exh 8.

David Hellhake testified that defendant directed Bonnie Lynn to have $200,000 wired from ATTS towards the National Media acquisition. Among the Florida documents produced after trial was a letter dated December 11, 1989 to Rosio Rosado, of the Cash Management Department of Sun Bank from Murray Schwartz as president of ATTS (D Exh 20). Schwartz directed Rosado to transfer $200,000 from ATTS's account to an account in a New Jersey bank for credit to the trust account of the Wilentz, Goldman & Spitzer law firm. This directly contradicts Hellhake's testimony that Bonnie Lynn transferred the funds at defendant's direction. The government's present speculation that Bonnie Lynn may have ensured that Murray Schwartz signed the letter and its observation that defendant was initiating and directing these types of decisions regarding ATTS are simply arguments which it might have directed to the jury had defendant been able to confront Hellhake with D Exh 20.

It was the government's contention at trial, supported by Hellhake's testimony, that supporting documents for the June and July 1989 $750,000 transfers from the two Compton Press funds to Granada Investments were not prepared until after August 1989 and that Gerardi and Marqueen did not became aware of the transactions until August 1989. The documents disclosed in Florida included an August 1, 1989 letter of understanding from Andrew Heine, signing as president of Granada Investments, to the Compton Press

Employees Profit Retirement Plan (D Exh :26). The letter was also signed by Hellhake and Raul Corona as trustees of the plans. It set forth the terms of the loan. From this defendant could have persuasively argued that signed documentation for the loan existed and was produced to Gerardi and Marqueen. Also among the Florida documentation produced after the trial was an August 31, 1989 memorandum drafted by Rata Corona which states that Gerardi and Marqueen had been "aware of our investments in DWG since early July." (D Exh 27). This contradicts the government's contention that Gerardi and Marqueen were kept in the dark about the advance to Granada Investments. This document should have been made available to defendant for use at trial.

At trial Hellhake testified that his father's company, G.H. Enterprises, Inc., had made no actual profit in connection with the Granada transfer and had no financial interest in defendant's companies. He also denied that G.H. Enterprises had invested directly in Equity Finance Group ("EFG"). Various documents belatedly derived from the Florida proceeding include a notation, probably written by David Hellhake, stating that G.H. Enterprises, as a Granada investor leaving the partnership, would get $350,000 and a % of EFG. (D Exh 45). There are a number of other documents from which it might be argued that G.H. Enterprise profited from its transactions with defendant - related companies. (D Exhs 46, 47, 48, 49). Standing alone the failure to produce these documents, which are of uncertain purport, would not rise to the level of a Brady violation requiring a trial, but the failure to produce them must be considered as part of an over-all failure to produce which occurred in this case.

In support of the government's contention that defendant raided Compton Press, Hellhake testified that large sums of money were moved from Compton Press to companies which defendant controlled, specifically, that between 1989 and 1991 there were several million dollars more paid out than were paid in. He denied on cross-examination that defendant had put into Compton Press $600,000 more than he had taken

out. Manny Ferro testified that the net flow of money from defendant's entities into Compton Press was negative. Among the Florida documents is a draft Compton Press balance sheet dated May 31, 1990 which includes a list of liabilities (D Exh 51). There is shown as payable to affiliates the sum of $1,480,019.60. This document bears significantly on the testimony of Hellhake, Ferro and Bowers that defendant's companies were not owed significant sums of money by Compton Press and Hellhake's testimony that he was unaware of $600,000 owed to defendant's companies. It should have been provided to defendant.

The government introduced a number of evidential items intended to show defendant's criminal intern: with respect to the UNUM insurance policy and the loss of $300,000 as a result of UNUM's liquidation charge. Roiling the waters was the mistaken deposit of the $1.4 million proceeds in the Compton Press operating account rather than in a retirement plan account created for the purpose of receiving the funds. At trial Bonnie Lynn testified that at the time of the transfer defendant directed her to come from ATTS to his office. There she learned from Jan Larson that an extra $1.4 million had shown up in one of their bank accounts. Defendant informed Lynn that he had raised his portion of the funds to complete a transaction, which led Lynn to conclude that these funds came from the Compton Press pension funds. Manny Ferro testified that defendant asked him to search for a missing November 1989 bank statement that would have reflected the account into which the UNUM money was deposited. Ferro further testified that much later, in March 1990, he met with defendant who produced the missing bank statement from his brief case and instructed him to ascertain the source of the $1.4 million in funds. According to Ferro he had been unaware prior to March 1990 that UNUM had been requested to discontinue the insurance contract.

Florida documents produced post trial include Ferro's handwritten work papers dated February 27, 1990 one of the entries reads "Resolve the liquidating loss issue on UNUM

contract". Lynn's testimony that she met with defendant in his Miami office immediately after the $1.4 million deposit is contradicted by a newly disclosed document showing that defendant was staying at a New York City hotel on the day following the deposit of the funds. Thus significant evidence upon which the government relied to establish defendant's criminal intent with respect to the UMUM transaction is refuted by documents that had been in the government's possession and were not made available for defendant's use at trial.

The government relied heavily upon Andrew Heine, who testified, among other things, that he had not signed any documentation in connection with the $750,000 loan from the Compton Press funds to Granada for the DWG transaction. There has now been produced from the Florida documents a signed copy of the August 1, 1989 letter of understanding (D Exh 26) in which Heine acknowledged the terms of the loan and Heine's 1991 correspondence with the Laexalt Washington law firm that shows that the law firm was supplying Heine, at his request, with signed copies of the loan documents. (D Exh 29).

Defendant further relies upon the government's failure to produce documents from the DOL's files which tend to show that Heine lied at trial when he testified that he had not signed documents in connection with the $750,000 loan to Granada, and in particular that he had not signed a promissory note in the amount of $600,000 and a promissory note in the amount of $150,000. In the DOL files were documents derived from the civil litigation brought by the Pension funds. Seven fully executed original loan documents were produced in connection with Heine's deposition, including the $600,000 and $150,000 promissory notes. Gus R. Lennevich, an expert forensic document examiner, examined the seven original documents and compared them with four known Andrew Heine signatures. He concluded that the Heine signatures on the original loan documents and notes matched Heine's known signatures. The government attorneys prosecuting this

case undoubtedly were unaware of this evidence that would have cast doubt upon important testimony of a key witness. However, this material was in the files of the same agency, the DOL, that prepared the present case for trial, and the government's Brady obligations extended to the contents of those files. It is true, as the government points out, that defendant was a party to the suit in which the expert submitted his report and that Magistrate Judge Chesler referred to that report in an unreported opinion filed in the case. That, however, does not relieve the government of its Brady obligations. There has been no showing that defendant was made aware of the report during the course of the civil litigation.

Defendant has proffered a number of other assertedly Brady documents derived from the Florida warehouse or from the DOL's records. It is unnecessary to describe them all in this opinion because the failure to have produced those described above is sufficient to require the granting of the motion for a new trial. For the same reason it is unnecessary to comment upon what defendant characterizes as newly discovered evidence in the files of the two civil actions against Kenneth Falk and his law firm. The evidence which is described above is favorable to defendant as it could have been used affirmatively to establish his version of the transactions or else to impeach government witnesses. The government had this evidence in its position. It would have required a major effort on the government's part to cull the material in the Florida warehouse arid, to a lesser extent, review the records assembled by the DOL in its civil investigation. Nevertheless, it was the government's obligation to perform that task not only to advance its own case but also to obtain evidence that might further defendant's defense. This it failed to do.

Prejudice to defendant ensued. It can be observed that even if defendant's version of all the transactions were accepted by the jury, the jury could still have found that he had the criminal intent requisite to establish the charges of

conspiracy, embezzlement and money laundering. The loans and investments of pension plan funds that defendant admittedly directed were shocking and outrageous. However defendant characterized them would not have precluded the jury from finding that he had the requisite criminal intent. Nevertheless the government relied on particular characterizations of the relevant transactions upon which the new evidence casts doubt and the government relied upon witnesses whose credibility is challenged by evidence that was not produced. In these circumstances, and viewing the new evidence in its entirety, confidence in the trustworthiness of the jury verdict is seriously diminished. Defendant is entitled to a new trial at which the jury will be able to arrive at a verdict based on the totality of the evidence.

b. Violation of Attorney-Client Privilege:

Defendant contends that newly discovered evidence establishes that the government has violated his attorney-client privilege by having access to conversations between himself and his attorneys and to privileged documents. With a few embellishments he pursues a path that has been trodden a number of times before.

After defendant was convicted of wire fraud and racketeering in the Eastern District of Pennsylvania on January 27, 1995 he was confined at the Federal Correctional Institute at Fairton. There he made a stream of telephone calls on a prison telephone that was subject to monitoring and recording pursuant to prison regulations. Inmates were advised of the regulation and were further advised that if they wished to talk with their attorneys they could make arrangements for unmonitored calls. Defendant did not make such arrangements and used the prison telephones for all his calls, including, on occasion, telephone calls to attorneys.

In 1995 defendant became the subject of another criminal investigation in the Eastern District and AUSA Ronald Cole caused grand jury subpoenas to be issued to FCI Fairton seeking recordings of telephone calls made by defendant to

specified telephone numbers during the period January through July. The numbers did not include those of his then attorneys.

Although defendant knew prior to the trial in this case that the prosecutors in the Eastern District had obtained these recordings, it was not until after his conviction in New Jersey that he moved for a new trial based, in part, on the contention that the government had obtained and reviewed taped confidential telephone conversations between himself and counsel. On July 14, 1997 his motion was denied, as I found there was no evidence that any government attorney in the District of New Jersey or the Eastern District had possession of any recorded conversations between defendant and any of his attorneys, 971 F. Supp. at 161, and specifically that "there is no evidence that the government attorneys trying this case had any knowledge from any source of communication between Pelullo and his attorneys". Id.

Thereafter defendant by motion sought disclosure of his recorded prison telephone conversation. AUSA Cole and Kathleen A. Waltz, an FBI employee, submitted affidavits in camera to Judge Robreno who was hearing defendant's motion. On September 3, 1998 Judge Robreno denied defendant's motion for access to his taped prison conversations.

While the motion before Judge Robreno was pending defendant moved for reconsideration of my July 14, 1997 order denying his motion for a new trial on the ground that the Eastern District proceeding disclosed that a prosecutor in the Eastern District had obtained and reviewed two tape recordings of conversations between defendant and his attorneys. In opposition to the motion the Assistant United States Attorney handling the Pelullo case in New Jersey submitted for in camera review the Cole and Waltz affidavits. I denied the motion, finding i) defendant had no expectation of privacy in the two telephone conversations with counsel as the calls were knowingly made over lines subject to taping

and monitoring by the Bureau of Prisons and ii) even if the telephone calls were protected by the attorney-client privilege, defendant "suffered no conceivable prejudice from the inadvertent interception of the two attorney conversations. The conversations did not relate to the New Jersey criminal proceedings and the New Jersey United States Attorney's Office was not informed of the existence or substance of the conversations until recently. No member of the prosecutor team in either New Jersey or Pennsylvania received or reviewed any communication between defendant and any of his attorneys in the instant case." United States v. Pelullo, 5 F. Supp. 2d 285, 289-90 (D.N.J. 1998), affirmed, 185 F. 3d 863 (3d Cir. 1999), cert. denied, 120 S. Ct. 838 (2000).

Both Judge Robreno's order denying defendant's motion for access to the matters before the grand jury and my order denying his motion for reconsideration were appealed to the Court of Appeals. The Court of Appeals affirmed both orders. It held that the taped conversations were not confidential communications because defendant was aware that his calls were being monitored. It further found with respect to the New Jersey proceedings that there was no Sixth Amendment violation because the Eastern District prosecutors did not share privileged information with the New Jersey prosecutors. The Cole and Waltz affidavits were part of the record before the Court of Appeals.

In violation of Judge Robreno's sealing order copies of the Cole and Waltz affidavits were sent to defendant. In the principal aspect of his present motion defendant relies upon the Cole affidavit and upon a report of the Department of Justice's Inspector General on the use of telephones in the federal prison.

The Cole affidavit discloses that Cole listened to recordings of a conversation between defendant and Kathleen O'Connell, Esq., a conversation between defendant and Neil Eggleston, Esq. and eleven conversations between defendant and Andrew Heine, Esq. The Cole affidavit also discloses that

the telephone number of at least one attorney representing defendant, Joseph Fioravanti, Esq. was among those subpoenaed in the Eastern District. The Inspector General's report recites, among other things, that the Bureau of Prison's attempts to monitor inmate calls "are virtually useless in preventing inmates from committing crimes using the telephones" because "only 3.5 percent of the tens of thousands of calls made each day from BOP facilities are monitored."

Defendant urges that the Cole affidavit undermines factual findings that I made and that the Inspector General's report destroys the findings in the district court and in the Court of Appeals that defendant waived his attorney-client privilege by using monitored telephones. These arguments must be rejected. The Cole affidavit was before me, Judge Robreno and the Court of Appeals when the earlier denials of defendant's motions were made. They do not alter the findings that even if the telephone calls were protected by the attorney-client privilege, defendant suffered no conceivable prejudice from the interception of the two attorney conversations and that defendant had no expectation of privacy in the two telephone conversations with counsel as the calls were knowingly made over lines subject to tapping and monitoring by the Bureau of Prisons. The fact that the Bureau of Prisons exercised its right to monitor and wiretap infrequently does not affect these findings. Any inmate who used the Bureau of Prison telephone lines without making prior arrangements for securing his attorney-client privilege waived the privilege and proceeded at his own risk.

Defendant's motion reverts once again to allegedly privileged documents stored in the Florida warehouse. This issue was dealt with and disposed of on a pretrial motion, 917 F. Supp. at 1077-80. The documents in the boxes that were brought from Florida for use in the prosecution of this case were copied for defendant's use. After the trial they were returned to the Florida United States Attorney's Office where they were again made available to defendant along with, for

the first time, a handwritten inventory dated February 24-26, 1993 which identified the documents loaned to the Newark FBI from the Florida search. The inventory cross-referenced the defendant's boxes from which the Newark agents seized the documents brought to Newark. According to defendant these boxes contained materials protected by the attorney-client privilege, and it follows, according to defendant, that Agent Ruffino when preparing this case for trial rummaged through boxes containing privileged information.

If it be assumed that the box numbers set forth in the February 1993 inventory correlate with the inventory that Special Agent Wood prepared, defendant has not established either that the boxes from which the materials in the Newark boxes were obtained contained privileged materials or that, if they did, such materials had anything to do with this case. The descriptions of "Privileged Documents in Pelullo Box" contained in Exh D22 negate in many instances that the documents were privileged, in no way affirmatively establish the privilege, and in most instances demonstrate that the subject matter of the documents was unrelated to this case. Defendant has failed to produce a single document which he claims was privileged and which he claims the government was aware of or, more importantly, used to his prejudice.

This takes us back to defendant's pretrial motion to dismiss the indictment for the reason that the government seized and made use of documents protected by the attorney-client privilege and to the court's opinion denying the motion. United States v. Pelullo, 917 F. Supp. 1065, 1075-80 (D.N.J. 1995). Nothing that defendant has now submitted alters the basic findings and conclusions of that opinion.

The opinion described the confused and vast array of documents that defendant assembled in the Florida warehouse with privileged documents hopelessly intermingled with the mass of non-privileged documents, leading Judge Kelly in the Eastern District to observe that there was no expectation of privacy when defendant mixed the allegedly privileged

material with those of various corporations (for a description of the contents of the warehouse see 917 F. Supp. at 1075, 1077-78). As stated in that opinion:

> In the present case, even if it were established that the government happened upon material protected by the attorney-client privilege, such access would have been purely inadvertent. It could well be argued, as Judge Kelly found, that the carelessness with which Pelullo treated supposedly privilege[d] documents constituted a waiver of his privilege. There is no need to reach that question here. What is clear is that Pelullo's method of storing his documents negates any claim that the government deliberately seized privilege[d] material. The FBI agents could not have known that any particular box or drawer contained privileged material.
>
> [8] Therefore, the legal standard to be applied in this case is that set forth in *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665, 66 L.Ed.2d 564 (1981). In *Morrison* the Supreme Court held that where a Sixth Amendment violation has occurred, "absent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been intentional." *Id.* at 365, 101 S.Ct. at 668.
>
> [9] Applying *Morrison*, a defendant must first show that the government has made use of privileged information. In the present case, Pelullo has failed to establish that the government has made use of or even had access to any privileged documents relevant to the charges contained in the indictment.

917 F. Supp. at 1078

The additional information that defendant now submits in connection with his attorney-client privilege argument adds

nothing to the substance of what was before the court when it dealt with this issue in 1995. It does not provide the basis for a new trial.

c. §2255 Petition:

Defendant has also moved pursuant to 28 U.S.C. §2255 advancing four grounds to vacate, set aside or correct his sentence, namely: i) the failure to provide the jury with specific jury unanimity instructions violated his Sixth Amendment rights; ii) the court misapplied the sentencing guidelines in that it sentenced defendant pursuant to U.S.S.G. §2S1.1 which is applicable to money laundering, whereas it should have sentenced him pursuant to the embezzlement guideline, which would have produced a shorter sentence; iii) the court improperly amended defendant's judgment of conviction to include forfeiture provisions; and iv) the government failed to present sufficient evidence to support the convictions for money laundering.

Only the first of these grounds merits extended discussion. The second and third can be dealt with if defendant is convicted after a new trial. The third ground, the asserted lack of evidence to support the convictions on the money laundering counts, was addressed and rejected on defendant's motion for a judgment of acquittal, United States v. Pelullo, 961 F. Supp. 736, 751 (D.N.J. 1997), and was raised on direct appeal to the Court of Appeals and held to be without merit. For the reasons set forth in 961 F. Supp. at 751-752 this ground remains without merit.

Defendant's first ground for §2255 relief presents serious questions. It must be determined whether it has legal merit and, if so, whether defendant can raise it in a §2255 petition.

As described above the indictment charged defendant with involvement during a three year period in a series of complex schemes to embezzle the assets of Compton Press and its retirement and thrift plans for his own personal use. Count 1 charged a two-part conspiracy to embezzle and to engage in money laundering. It was alleged that these objects

were accomplished through four schemes: i) the looting of Compton Press, leading to its bankruptcy, ii) the loan of Compton Press benefit plan funds to Granada, iii) the loan of Compton Press benefit plans to ATTS and iv) the conversion of a benefit plan asset in the form of a UNUM policy.

The jury charge relating to Count 1 did not require that there be unanimity either as to the object of the conspiracy or as to the particular schemes alleged. The charge read:

> Count 1 lists two offenses as the object of the Section 371 conspiracy - theft or embezzlement of the Compton Press pension funds and money laundering. You need not find that the defendant conspired to commit both of these offenses to find the defendant guilty of the conspiracy charged in Count 1. In order to find the defendant guilty of Count 1, you must, however, unanimously agree that the defendant conspired to commit at least one of the offenses charged as an object of the conspiracy.

It is defendant's contention that this failure to require unanimity both as to the offenses defendant conspired to commit and as to the four alleged schemes deprived him of his Sixth Amendment rights.

Defendant contends that a similar defect appears in the Counts 2-12 charges relating to embezzlement and in the Counts 13-54 money laundering charges. Each of those Counts incorporated Count 1 by reference, and, according to defendant, the applicable charge suffered from the same defect as the charge relating to Count 1. Further, the charge applicable to the embezzlement offenses did not require unanimity as to whether defendant engaged in i) embezzling, ii) stealing, iii) abstracting, or iv) converting pension funds. The charge applicable to money laundering did not require unanimity as to whether defendant engaged in the financial transaction i) with the intent to promote the carrying on of the specified unlawful activity or ii) with knowledge that the

financial transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity.

The charge relating to embezzlement read:

> As you can see, the statutory language of Section 664 . . . covers a number of different sorts of takings. However, the United States is not required to prove all four means, which I have just defined for you, were actually employed by the defendant. Rather, the government's proof need only establish beyond a reasonable doubt that the defendant unlawfully and willfully, either embezzled, or stole, or abstracted, or converted to his own use or the use of another the money or property of the Compton Press Employees' Profit Sharing Retirement Plan or the Compton Press Employees' Thrift Plan, as charged in the indictment.

The charge relating to money laundering read:

> [T]o find the defendant guilty of money laundering, you must find that the government has proven . . . beyond a reasonable doubt, [among other things], [t]hat the defendant engaged in the financial transaction with either the intent to promote the carrying on of the specified unlawful activity, or knowledge that the financial transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity.

Defendant's principal ground for §2255 relief is the failure of the respective jury charges to require the degree of unanimity that defendant has specified. Defendant did not object to the charges given at the time of trial and he did not raise this asserted error on his appeal until it was so late that the Court of Appeals declined to hear it.

In United States v. Frady, 456 U.S. 152, the Supreme Court held that when a defendant has failed to object to an alleged erroneous jury instruction and pursue the usual direct appellate remedies, the movant can obtain § 2255 relief only if he can show: 1) "cause" excusing the double procedural default; and 2) "actual prejudice" resulting from the alleged error. Id. at 167-68. "Because the cause and actual prejudice requirement is conjunctive, a district court may analyze either requirement first." United States v. Motto, 1991 U. S. Dist. LEXIS 12541, *6 (E.D. Pa. Sept. 5, 1991).

The defendant must sh w "actual prejudice" resulted from the alleged error to prevail under § 2255. To establish actual prejudice, the defendant "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Fradv, 456 U.S. at 170(emphasis in original). Thus, the defendant must meet a very high burden in order to prevail. In essence, petitioner must establish he was denied fundamental fairness at trial. Id.

Defendant contends that because of the complexity of the indictment and the lack of a specific unanimity instruction, the conviction was likely by a constitutionally impermissible verdict. The Court of Appeals for the Third Circuit has held that the Sixth Amendment requires unanimity on all elements of an offense. United States v. Edmonds, 80 F.3d 810 (3d Cir. 1996)(en banc). "While it is true that in most cases, a general unanimity instruction is sufficient to support .a conviction, a specific unanimity instruction is required 'where the complexity of the case, or other factors, creates the potential that the jury will be confused.'" United States v. Russell, 1345 F.3d. 171, 177 (3d Cir. 1997), quoting, United States v. Beros, 833 F.2d 455, 460 (3d Cir. 1987). There is no dispute in this case that a general unanimity charge was given. Thus, the threshold issue to be determined is whether a specific unanimity charge as to each count charged was required.

The defendant relies on United States v. Beros, 833 F.2d 455, for the proposition that a specific unanimity charge was required for each count of the indictment. In Beros, the petitioner was charged with, inter alia, several counts of "embezzling, stealing, abstracting or converting funds to his own use" in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 664. Each relevant count of the indictment charged several different transactions which could constitute one of the proscribed acts included in the charged statutes. In Beros, the Court of Appeals held that the trial court's general instruction was insufficient to ensure a unanimous verdict. The Court explained that it "is plainly not enough that the jury was unanimous in finding one theory on which it believed Beros culpable. The jury needed also to match that finding to another unanimous finding regarding a particular act". Id. at 461.

Count 1

It is defendant's position that while the court correctly charged the jury that it must unanimously agree that the defendant conspired to commit one of the offenses charged as an object of the conspiracy, the court should have further specified that the jury was required to find unanimously a conspiracy to commit the same offense, i.e., either embezzlement or money laundering or both. Defendant contends that the jurors may have unanimously agreed that he conspired to commit an offense, but disagreed as to which offense he conspired to commit. Defendant also suggests that a unanimity instruction should have been given with respect to the underlying scheme or act involved in the conspiracy charge.

The government, on the other hand, contends that the conduct charged in count 1 was the single continuing agreement to embezzle funds, not individual acts of embezzlement or money laundering. Relying on United States v. Jackson, 879 F.2d 85 (3d. Cir. 1989), the government argues that it would have been proper for the jurors to rely on different acts of embezzlement or money laundering in

arriving at their verdict. In Jackson, the Court of Appeals addressed whether a specific unanimity instruction was required as to the exact five individuals involved in the continuing criminal enterprise statute. The Court explained that:

> "the proper focus of our unanimity analysis is on the defendant's conduct, *i.e.*, defendant's performance of culpable acts. We have never required that jurors be in complete agreement as to the collateral or underlying facts which relate to the manner in which the culpable conduct was undertaken."

Id. The government's reliance on Jackson adequately addresses the defendant's contention that the jury must be unanimous as the exact schemes or acts, but fails to address the contention that the court failed to charge the jury that it must be unanimous, not as to a collateral or underlying fact, but as to the specific offense which the defendant conspired to commit.

In United States v. Edmonds, 80 F.3d 810, 819, n.13, the court suggested that it would reject the contention that a jury need not be unanimous as to the object of the offense where a defendant is charged with a multiple-object conspiracy. Although not relevant to the holding in Edmonds, the court addressed a suggestion from a dissenting colleague that "a defendant can be convicted of conspiracy without jury agreement as to which object, of various objects alleged, forms the basis of the conspiracy." Id. Skeptical of such a premise, the majority suggested that "[a]t some point, different alleged conspiracy objects suggest such disparate fact patterns that jury agreement as to the precise object of the conspiracy is necessary to support conviction." (Id. citations omitted). Thus, it appears that jury agreement is required as to the object of the conspiracy. The government's position is rejected to the extent that it suggests unanimity is not required as to the object of the conspiracy.

The government further contends that the conspiracy count should stand because the jury found the defendant guilty of the remaining counts of the indictment. The remaining counts represented distinct and separate transfers of money belonging to the pension and thrift funds. Thus, the government contends that under the circumstances the outcome of the trial would not have been different even if the unanimity instructions had been given. The defendant, however, correctly points out that the government cannot rely upon his substantive convictions because the looting of Compton Press itself was not included in any of the substantive charges, yet was charged as one of the schemes which was part of the embezzlement object of the conspiracy. Thus, the verdicts on counts 2-54 do not serve as the "functional equivalent" of a verdict on the elements necessary for conviction required by Count 1. See Edmonds, 830 F.3d at 824.

Although defendant's contention that a unanimity charge must be given with respect to specific acts or schemes is rejected, the defendant has established that a specific unanimity instruction should have been given here as to the specific offense defendant conspired to commit, i.e., embezzlement and/or money laundering or both. There is quite obviously a genuine possibility that different jurors determined petitioner's guilt without a unanimous agreement as to the offense the defendant conspired to commit. Where as here the government chooses to proceed "under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at lease one of the theories to the satisfaction of the entire jury." Beros, 833 F.2d at 462.

However, the "conclusion that the jury instruction was erroneous does not end the inquiry. Instructional errors must often be examined for harmless error before a defendant is entitled to relief." Whitney v. Horn, 280 F.3d. 240 (3d Cir. 2002). In Brecht v. Abrahamson, 507 U.S. 619 (1993), the Supreme Court announced the harmless error test to be applied in an application for collateral relief. Under Brecht,

an error must have "had substantial and injurious effect or influence in determining the jury's verdict." Id. at 623.

Here, the defendant contends that the jury instruction deprived him of a constitutional right to a unanimous jury verdict. Given that the jury could have arrived at a non-unanimous verdict in violation of the Sixth Amendment as to Count 1 as a result of the erroneous instruction, it cannot be said that the error was harmless. This is not a case where it can be said that the verdict may stand because a finding on another count was the "functional equivalent" of a finding on Count 1. See Edmonds, 830 F.3d at 824. Thus, finding that the error was not harmless, it follows that the defendant suffered actual prejudice as defined by Frady, as his trial was infected with "error of constitutional dimensions." Frady, 456 U.S. at 170. However, as discussed below, the defendant is not entitled to new trial on this ground, as he has failed to establish cause for his procedural default.

Counts 2 through 12

It is also defendant's position that the court was required to instruct the jury specifically that it must unanimously agree on the means which were employed in committing each offense. As discussed above, the requirement of a unanimity charge only arises where there is a probability of juror confusion due to the nature of the charge. There is no such potential for juror confusion with regard to counts 2-12.

The defendant contends that because count 1 was incorporated by reference into counts 2 through 12 of the indictment, multiple schemes and factual scenarios were injected into the individual § 664 counts. However, the incorporation by reference of language from count 1 describing the Granada, ATTS, and UNUM schemes does not taint the verdict on the individual counts because each of the counts involved a discrete act.

In United States v. Cusumano, 943 F.2d 305 (3d Cir. 1997), the defendant was charged, inter alia, with four counts of embezzlement under 18 U.S.C. 664. Although the trial

court gave a general unanimity charge, it declined to give a specific unanimity charge as to the four disjunctive elements of the count, i.e. engaging in embezzling, stealing, abstracting or converting pension funds. The defendant argued that the failure to give a specific unanimity charge as to the elements of the counts contradicted the Court of Appeals holding in Beros. In Beros, the court held that the need for a specific unanimity charge arose out of the fact that the pertinent counts of the indictment enumerated several distinct occurrences, any one of which would support a conviction. In Cusumano because multiple acts were not charged under a specific count, the only risk of confusion arose out of the disjunctive nature of the statute, and thus the need for a specific unanimity charge was not triggered.

It is the government's position that the Cusumano decision makes clear that a specific unanimity instruction was not required here. In the present case, Counts 2 through 12 each charged only one discrete act, not a series of transactions as in Beros. Thus, the only possible confusion arose from the fact that a conviction under § 664 can be satisfied by alternative legal theories. It necessarily follows that defendant cannot show actual prejudice warranting §2255 relief and his petition on this ground should be denied.

The defendant seeks to distinguish Cusumano on the basis of the manner in which the indictment was drafted. The defendant suggests that the present case is more factually analogous to Beros, because the indictment not only charged different methods in which the offense could have been committed, but also charged that each of Counts 2 through 12 incorporated by reference the other counts of the indictment. Defendant, however, fails to articulate what it is about the manner in which the indictment was drafted that necessitates a specific unanimity charge. It is clear that Counts 2-12 of the indictment each includes a separate act. Although the various schemes were incorporated by reference into each of the Counts, the jury was not required to determine which scheme was implicated because the transaction itself implicated the

scheme. It does not follow that a specific unanimity instruction was necessary on the embezzlement counts as a result of the various schemes involved.

Counts 13 through 54

Counts 13 through 54 identify specific amounts of money that were laundered on specific dates with the dual mental states of promoting the unlawful activity and concealment of the nature, location, source, and ownership of the proceeds of the unlawful activity. Defendant claims that his conviction should be overturned in light of the court's failure to provide a specific unanimity instruction despite the different mental states applicable to the money laundering statute.

Defendant points out that the government represented to the court that it could not prove concealment with regard to all of the money laundering offenses. See United States v. Pellulo, 961 F.Supp. at 752. Therefore, the defendant contends, there is a possibility he was convicted based upon a theory discredited by the government itself, and this is a possibility which cannot be discounted because of the lack of a specific unanimity instruction. The fundamental problem with defendant's position, however, is that the defendant had previously contended that there was insufficient evidence to support a conviction under § 1956(a)(i)(B)(i), and defendant's contention as to sufficiency was rejected:

> To establish concealment or disguise, the evidence must, of course, establish the requisite knowledge and intent on Pelullo's part. Certain of the transfers out of the Granada, Adorno and Compton Operating accounts do not at first blush have any obvious business purpose and a jury might well conclude in the light of all the evidence that they were designed to conceal or disguise the nature, source, ownership or control of the embezzled funds. There is evidence on the basis of which the jury could have found at least on some of Counts 13-54 that there was a § 1956(a)(1)(B)(i) violation.

Id. Thus, defendant's position that a lack of a specific unanimity charge could have resulted in his conviction on a theory discredited by the government is rejected.

Furthermore, despite defendant's insistence to the contrary, United States v. Navarro, 145 F.3d 580 (3d Cir. 1998) supports the conclusion that the defendant did not suffer actual prejudice. In Navarro, the Court of Appeals addressed the question whether the district court committed plain error by failing to instruct the jury that they had to be unanimous as to the mental states set forth in § 1956 (a)(1) that the defendant possessed. The defendant argued, inter alia, that "the verdict should be reversed on the ground that the jury charge, because of the lack of a unanimity instruction, was capable of confusing and misleading the jury". Id. at 591. In rejecting the defendant's argument, the court noted that under Cusumano, where "a jury returns a verdict on an indictment charging several acts in the conjunctive...the verdict will stands if the evidence is sufficient as to any of the acts charged." Id. at 592.

In the instant matter, counts 13 through 54 charged discrete acts of money laundering. Thus, there was no risk of jury confusion regarding the factual basis for the convictions returned on the individual counts. Indeed, this case is unlike Beros, where the risk of juror confusion arose out of the multiple theories and acts included in specific counts of the indictment.

Under the first prong of the Frady test, defendant must show cause existed for the double procedural default, i.e. failure to raise the issue at trial and failure to raise it on appeal. To establish "cause" for procedural default, the defendant must show that some objective factor external to the defense impeded counsel's efforts to comply with the procedural rules. See Murray v. Carrier, 477 U.S. 478, 488 (1986). "[A] showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable,

would constitute cause under this standard." Id. (Internal citations and quotations omitted).

The government contends that there was no cause for defendant's procedural default, and thus, defendant's petition should be denied. In support of this contention the government points out that the case relied upon almost exclusively by defendant, United States v. Beros, 833 F.2d 455, was decided in 1987, and therefore could have been relied upon by defendant at the time of his trial and direct appeal. Thus, the government notes, there is no apparent reason why objections to the jury charge could not have been made and preserved at the time of trial or on direct appeal.

The defendant counters with the contention that cause exists for its failure to raise the issue on direct appeal, and the government should be judicially estopped from arguing that he has failed to establish cause for his procedural default. The defendant points out that he attempted to raise the issue on direct appeal. The defendant attempted to raise the issue for the first time on appeal in a supplemental brief. When the defendant moved to file his supplemental brief, the government opposed the motion. In opposition to defendant's effort to file a supplemental brief and raise the issue, the government stated inter alia:

> If this Court denied Appellant's attempt to improperly add additional claims to this appeal, and appellant ultimately does not prevail in this appeal, he will not be precluded from raising these claims in a petition for relief under 28 U.S.C. § 2255 which, given the length of appellant's sentence, will inevitably follow this appeal.

The court denied defendant's motion to supplement the appeal. The defendant contends that because the government suggested that the defendant would not be precluded from raising the issues in a petition for relief under § 2255, the government is estopped from arguing that defendant is precluded on the ground of procedural default. The

government insists that the language relied upon by defendant and included in the government's opposition to the filing of a supplemental brief was an "isolated" comment which does not create substantive rights in the defendant.

Defendant's contention that the government was responsible for his failure to raise the issue on direct appeal because it objected to the defendant's filing of an untimely supplemental brief is rejected. That circumstance does not exempt defendant from the strictures of Frady. Although it appears that defendant suffered actual prejudice from the erroneous jury instruction provided as do Count 1, his petition must be denied as defendant has failed to establish cause for his procedural default.

In sum, the second and third grounds of defendant's § 2255 motion need not be addressed because the issues they raise will be considered in the context of defendant's new trial. The fourth ground is without merit. To the extent that defendant's first ground challenges the jury charge relating to counts 2-54 it lacks merit to the extent that the first ground challenges the jury charge relating to count 1, it correctly contends that a specific unanimity charge should have been given, but defendant is barred by Frady, from raising the issue in his present petition. The petition will be dismissed with a certificate of appealability.

III. Conclusion

Defendant's motion for a new trial on the ground that the government failed to meet its Brady obligations will be granted. The other grounds for a new trial lack merit.

Defendant's motion for relief under 28 U.S.C. 2255 will be dismissed with the issuance of a certificate of appealability*.

DICKINSON R. DEBEVOISE
U.S.D.J.

Dated: May 17, 2002

*It is recognized that if the government does not appeal and defendant has a new trial, issuance of a certificate of appealability may serve no useful purpose. If the government does appeal, however, the issuance of a certificate of appealability may enable defendant to cross appeal and muse the issues relating to the failure to give a jury unanimity charge. As to those issues defendant has made a substantial showing of the denial of a constitutional right.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2710/2808/2957

UNITED STATES OF AMERICA,
Appellant at No. 02-2808

v.

LEONARD A. PELULLO,
Cross-Appellant at No. 02-2808

UNITED STATES OF AMERICA,

v.

LEONARD A. PELULLO,
Appellant at No. 02-2957

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, and GARTH*

PETITION FOR REHEARING *EN BANC*

The petitioner for rehearing filed by Appellee/Cross-Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other

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* Senior Judge Garth, who sat on the original panel, is limited to panel rehearing only.

available circuit judges in active service, and ***no judge who participated in the decision having asked for rehearing***, and a majority of the circuit judges of the Circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court

/s/ Leonard J. Garth, Senior Circuit Judge

Dated: March 24, 2005
tyw/cc: Lawrence S. Lustberg, Esq.
Norman J. Gross, Esq.
George S. Leone, Esq.

Supreme Court U.S.
FILED
DEC 12 2005
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No. 05-244

In the Supreme Court of the United States

LEONARD A. PELULLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government sufficiently made allegedly exculpatory material available to petitioner under *Brady* v. *Maryland*, 373 U.S. 83 (1963), when the government provided petitioner with access to the material and the material consisted of petitioner's own documents, even though the government did not physically deliver the material to petitioner.

2. Whether the government's statements that the documents at issue did not contain material that the government had a duty to disclose under *Brady* resulted in a *Brady* violation when petitioner did not rely on those statements.

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In the Supreme Court of the United States

No. 05-244

LEONARD A. PELULLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 399 F.3d 197. The order and opinion of the district court (Pet. App. 45a, 46a-87a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2005. A petition for rehearing was denied on March 24, 2005 (Pet. App. 88a-89a). On June 10, 2005, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including July 22, 2005. On July 8, 2005, Justice Souter further extended the time to August 19, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to embezzle funds belonging to an employee retirement plan and to launder the proceeds of that embezzlement, in violation of 18 U.S.C. 371; 11 counts of embezzlement, in violation of 18 U.S.C. 664; and 42 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1). He was sentenced to 210 months of imprisonment, to be followed by three years of supervised release. Gov't C.A. App. 3711-3713. The court of appeals affirmed petitioner's convictions and sentence in an unpublished opinion, 185 F.3d 863 (1999) (Table), and this Court denied a petition for a writ of certiorari, 528 U.S. 1096 (2000).

Petitioner subsequently moved for a new trial pursuant to Federal Rule of Criminal Procedure 33, arguing, *inter alia*, that the government had failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court granted petitioner's motion. Pet. App. 58a-68a, 87a. The court of appeals reversed. *Id.* at 1a-44a.

1. In 1989, petitioner acquired control of Compton Press, Inc. and its retirement and thrift plans. Pet. App. 5a. Through a complex set of wire transfers, petitioner systematically diverted millions of dollars in assets from the benefit plans to himself. *Id.* at 5a-6a. Petitioner engineered three embezzlement schemes. First, petitioner withdrew more than $1.15 million from the benefit plans to further his acquisition of DWG Corp. and to pay for personal expenses. *Id.* at 6a. Second, petitioner withdrew money from the benefit plans to purchase Ambassador Travel. *Ibid.* Under the guise of securing

loans from the benefit plans, petitioner siphoned off $1.3 million, much of which filtered down to petitioner and his family. *Ibid.* Third, petitioner terminated an annuity contract that belonged to the Compton Press retirement plan and used the $1.4 million in proceeds to finance personal and business activities. *Ibid.*

2. A grand jury in the District of New Jersey returned a 54-count indictment against petitioner charging him with conspiring to embezzle approximately $4.176 million belonging to the benefit plans and laundering the proceeds of the embezzlement, in violation of 18 U.S.C. 371; 11 counts of embezzlement, in violation of 18 U.S.C. 664; and 42 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1). Gov't C.A. App. 3716-3731.

At the same time that the United States Attorney's office in the District of New Jersey was investigating petitioner' activities in connection with Compton Press, the United States Attorney's office in the Middle District of Florida was conducting an unrelated investigation of petitioner. Pet. App. 8a. As part of that investigation, agents of the Federal Bureau of Investigation (FBI) executed a search warrant for a 2400-square foot warehouse in Miami that housed business records of 25 of petitioner's companies. *Ibid.* Pursuant to the warrant, agents seized 904 boxes, 114 file cabinets, and 10 file cabinet drawers of corporate and financial records. *Ibid.* The documents were disorganized and often mislabeled. *Ibid.* As the district court later found, petitioner engaged in a "dizzying succession of wire transfers" generating "mountains of documents," and "[n]o one but [petitioner] could comprehend it all in its entirety. He alone, an obviously highly intelligent person, was able to keep track of it all and manipulate it to his advantage." *Id.* at 19a (citation and emphasis omitted).

The FBI moved the documents to Jacksonville, Florida, retained 160 boxes and 36 file cabinets of records that were pertinent to the Florida investigation, and returned 75,000 pounds of other documents to petitioner. Pet. App. 8a. The federal prosecutor in Florida sent petitioner's lawyers a partial index of all of the warehouse documents and offered to provide them access to the documents for inspection and copying. *Id.* at 8a-9a.

In 1993, the Department of Labor (DOL) agents involved in the New Jersey investigation traveled to Jacksonville. Pet. App. 9a. After conferring with Florida agents and conducting a cursory review, the DOL agents identified six boxes of the warehouse documents that were relevant to the New Jersey investigation. *Ibid.* The government subsequently provided those documents to petitioner. *Id.* at 12a, 53a.

In a hearing in December 1994, petitioner, proceeding pro se, acknowledged that he knew that the government possessed the documents seized from his Miami warehouse and that some of those documents related to Compton Press and the benefit plans. Pet. App. 10a. Petitioner requested that all the warehouse documents be made available for his inspection, and he represented that he would travel to Jacksonville to review them. *Ibid.* Although the government had previously stated that it was unaware of any *Brady* information, petitioner explained that he needed to review the documents to identify those pertinent to the defense case. *Ibid.* The government assured the district court that it would make available to petitioner all the warehouse documents, with the possible exception of those relevant only to the Florida investigation that the prosecutors in that case were not yet prepared to disclose. *Id.* at 10a-11a.

The district court ordered the prosecutor to identify for petitioner those warehouse documents that it would voluntarily disclose so that petitioner could seek the court's intervention if necessary to obtain the remaining materials. Pet. App. 11a. In response to that order, the prosecutor assured the court that it had previously disclosed all *Brady* material of which it was aware, and would disclose additional *Brady* material as it learned of its existence. *Id.* at 12a.

Two months later, petitioner asked the federal prosecutor in the Middle District of Florida to release documents relevant to the New Jersey case. Pet. App. 12a. In response, the New Jersey prosecutor informed him that the six boxes that had been disclosed "represent all of the documents obtained through the Florida search and seizure, which we believe may be relevant to the case pending in the District of New Jersey." *Ibid.* (emphasis omitted). Nonetheless, the prosecutor told petitioner to make arrangements with the federal authorities in the Middle District of Florida if he wished to inspect or copy other documents from the search. *Ibid.* Soon thereafter, the Florida federal prosecutor offered to have the documents copied at petitioner's expense. *Ibid.* She asked petitioner's standby counsel to notify her of the arrangements that petitioner wished to make. *Ibid.* Petitioner neither complained that he did not have the funds to copy the documents nor requested money from the court for that purpose. *Id.* at 23a n.15.

In March 1995, petitioner informed the court that, notwithstanding the government's position that the six boxes contained all relevant documents from the warehouse, he wished to determine what was relevant to his case and what he would need to defend himself. Pet. App. 12a. He then asked for a continuance of several

months to obtain the documents and review them. *Ibid.* The prosecutor again informed the court and petitioner that arrangements for reviewing the documents could be made with the prosecutor in Florida. *Id.* at 13a. The district court urged petitioner to have his stand-by attorney review the warehouse documents if petitioner was unable to review them himself. *Ibid.* Petitioner later assured the district court that his standby counsel was "coordinating the efforts to obtain the documents." *Ibid.* (citation omitted).

At petitioner's request, the district court delayed the trial date several times. Pet. App. 13a. By December 1995, petitioner no longer wished to proceed pro se, and his standby counsel was elevated to full counsel. *Ibid.* That counsel then requested another continuance to review the large number of relevant documents, including the warehouse documents. *Ibid.* Counsel asserted that he had a responsibility to review those documents. *Id.* at 14a. In opposing the continuance, the prosecutor noted that his team had reviewed approximately 100 boxes in the warehouse and had brought to New Jersey six boxes that it considered important enough to move. *Ibid.* He nonetheless informed the court that it was very difficult for him to predict exactly what defense counsel would need. *Ibid.* The district court granted the request for a four-month continuance so that counsel could review the documents. *Id.* at 14a-15a.

Days before the trial was scheduled to begin, a new lawyer was substituted as petitioner's counsel. Pet. App. 15a. That attorney told the New Jersey prosecutor that he, or someone in his office, intended to travel to Florida to review the warehouse documents. *Id.* at 15a-16a, 26a. The prosecutor responded that the Florida prosecutor had assured him that there were no docu-

ments in Florida pertaining to Compton Press or to the charges against petitioner. *Id.* at 15a-16a. In response to a defense request that the government confirm that it had provided all materials subject to disclosure, the prosecutor enclosed additional documents and then stated that "the United States is not aware of any additional *Jencks*, [Jencks Act, 18 U.S.C. 3500], *Giglio* [v. *United States*, 405 U.S. 150 (1972)] or *Brady* material." *Id.* at 16a.

3. A jury found petitioner guilty on all counts and ordered forfeiture in the amount of $3,562,987. Pet. App. 2a. The court then sentenced petitioner to 210 months of imprisonment, to be served concurrently with his sentence imposed on separate racketeering and wire fraud convictions in the United States District Court for the Eastern District of Pennsylvania. *Ibid.*

4. Following petitioner's conviction, petitioner's counsel sought access to the warehouse documents in connection with the indictment against petitioner in Florida. Pet. App. 16a. The government agreed to provide access to the documents, and a paralegal who worked for petitioner went to Jacksonville to examine the documents. *Ibid.* That paralegal identified warehouse documents that were relevant to the New Jersey prosecution. *Ibid.*

Petitioner filed a motion for a new trial, alleging, *inter alia*, that the government had failed to produce exculpatory warehouse documents in violation of *Brady*. Pet. App. 2a, 17a. The district court granted petitioner's motion for a new trial. *Id.* at 46a-87a. The court rejected the government's argument that it had not suppressed the documents within the meaning of *Brady* because petitioner had knowledge of the documents and the government had made them available to petitioner

and his counsel. *Id.* at 59a-60a. The court concluded that the petitioner and his counsel reasonably relied on the government's representations that there were no relevant documents in the Florida warehouse. *Ibid.*[1]

5. The court of appeals reversed. Pet. App. 1a-44a. The court held that, in order to establish a *Brady* violation, a defendant must show that the government "suppressed" the evidence at issue, and that petitioner had failed to make that showing. *Id.* at 17a-18a. At the outset, the court noted that petitioner had created a massive number of documents and that the government therefore faced an enormous practical difficulty in discovering and revealing all potentially relevant information. *Id.* at 19a. The court then addressed three additional considerations.

First, the court emphasized that petitioner knew about the existence of the warehouse documents. Pet. App. 21a. As the court explained, they were petitioner's own documents, he was aware they were housed in Florida, and he had already viewed a massive number of documents from the warehouse, alerting him to what he could expect to find in the remainder of the documents. *Ibid.*

Second, the court found that the government repeatedly made the warehouse documents available to petitioner and his attorneys for inspection and copying. Pet. App. 23a. The court explained that, having made the documents available to petitioner and his counsel, the government did not have any additional duty under

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[1] The district court also found that the government suppressed a second set of documents in violation of *Brady*. Pet. App. 49a-50a, 59a. The court of appeals held that the government did not have an obligation to disclose those documents, *id.* at 30a-35a, and that ruling is not at issue here.

Brady to "ferret out" defense-favorable information from those documents. *Ibid.*

Third, the court rejected as "fanciful" petitioner's claim that he had relied on the government's representation that the warehouse documents did not contain any relevant evidence. Pet. App. 26a. The court noted that, before 1996, petitioner insisted that only he could determine the relevance of the documents, and he had obtained a continuance in order to have stand-by counsel examine the documents. *Ibid.* While petitioner's second counsel stated in an affidavit that he had relied on the government's representation, the court found no genuine reliance because petitioner's second counsel could not have examined the documents in the brief period between the time he was appointed and the time of trial. *Id.* at 27a.

ARGUMENT

Petitioner contends (Pet. 9-20) that the government violated *Brady* by failing to deliver to petitioner all of the warehouse documents that were relevant to his defense. That contention is without merit. Based on the facts of this case, the court of appeals correctly determined that the government did not suppress those documents. That determination does not conflict with the decision of any other circuit or any decision of this Court. Further review is therefore not warranted.

1. In *Brady*, the Court held the "suppression by the prosecution of evidence favorable to an accused * * * violates due process where the evidence is material to guilt or punishment." 373 U.S. at 87. Thus, a critical element of a *Brady* claim is a showing that the government *suppressed* the evidence at issue. *Strickler* v.

Greene, 527 U.S. 263, 281-282 (1991). Petitioner failed to make that showing.

Three considerations support that conclusion. First, petitioner knew about the nature of the warehouse documents because they were his own documents. Pet. App. 21a-22a. Second, the government repeatedly made the warehouse documents available to petitioner and his attorneys for inspection and copying. *Id.* at 23a. And third, petitioner did not rely on the government's statements that the warehouse documents did not contain relevant evidence. *Id.* at 25a-27a. Instead, petitioner repeatedly stated that he or his counsel would examine those documents to determine their relevance to the defense. *Ibid.* In those circumstances, petitioner failed to show that there was any suppression of the documents by the prosecution.

2. Petitioner contends (Pet. 12-16) that the decision below conflicts with holdings from the Ninth, Tenth, and D.C. Circuits. But the cases from those circuits on which petitioner relies do not involve the confluence of the three considerations discussed above. And each of those circuits has reached a result consistent with the court below in circumstances that resemble more closely the circumstances here.

a. Petitioner relies (Pet. 12) on the Ninth Circuit's decision in *Gantt* v. *Roe*, 389 F.3d 908 (2004). In that case, the Ninth Circuit rejected the government's contention that it had no duty under *Brady* to disclose exculpatory information that it had uncovered in an investigation because the defendant could have uncovered the same information through a parallel investigation. The court reasoned that a defendant's failure to undertake an adequate investigation does not absolve the government of its *Brady* obligations. *Id.* at 913. The court also

emphasized that the defendant had relied on the government's representations that it was keeping the defense apprised of developments in the investigation. *Ibid.*

There is no conflict between *Gantt* and the decision below. In this case, the government did not seek to absolve itself of its *Brady* obligation by arguing that petitioner should have conducted a parallel investigation to find information he knew nothing about. Rather, the government affirmatively fulfilled its *Brady* obligation by extending to petitioner the opportunity to review petitioner's own documents. And while the defendant in *Gantt* relied on the government's representation that it would keep him apprised of developments in the investigation, petitioner did not rely on any representations by the government.

The Ninth Circuit's decision in *United States* v. *Shelton*, 588 F.2d 1242 (1978), cert. denied, 442 U.S. 909 (1979), involves circumstances that more closely resemble the circumstances here and demonstrates that the Ninth Circuit's approach accords with the approach of the court below. In that case, the defendant sought a report of an interview between the government and a bookkeeper who told investigators that he was not aware of any wrongdoing by the defendant. The government was unable to locate the report, but disclosed the bookkeeper's address to the defendant. The court held that the government had fulfilled its *Brady* obligations by supplying the defendant with the bookkeeper's address. The court explained that:

> First, Shelton knew exactly what benefit he hoped to secure from [the bookkeeper's] testimony and, therefore, had an incentive to seek him out. Second, the record supports the conclusion that [the bookkeeper] was available to the defense. * * * Under these

> circumstances, it is unreasonable to ask us to believe that the defense could not have contacted [the bookkeeper].

Id. at 1250.

Here, petitioner not only had an incentive to examine the documents at issue, he announced his intention to do so. And while the government in *Shelton* did no more than assist the defendant in locating a witness who possessed the relevant information, here the government made the very material at issue available to petitioner. Accordingly, under the analysis in *Shelton*, there was no *Brady* violation here.

More generally, the Ninth Circuit has held that "[s]ince suppression by the Government is a necessary element of a *Brady* claim, if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails." *United States* v. *Dupuy*, 760 F.2d 1492, 1501 n.5 (1985). Because the government made the documents at issue available to petitioner, that principle is directly applicable here.[2]

---

[2] The other Ninth Circuit cases cited by petitioner (Pet. 12-13) are inapposite here. In *Benn* v. *Lambert*, 283 F.3d 1040, 1060-1062 (9th Cir.), cert. denied, 537 U.S. 942 (2002), the government informed the defendant that its experts had reached a conclusion that was consistent with the government's theory, when the experts' conclusion undercut the government's theory. In *United States* v. *Howell*, 231 F.3d 615, 624-625 (9th Cir. 2000), cert. denied, 534 U.S. 831 (2001), the government failed to correct an erroneous report that incriminating evidence had been recovered from the defendant's traveling companion, rather than the defendant, and the defendant based his defense on that erroneous report. And in *United States* v. *Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986), the government alerted the defendant to the existence of certain tapes, but told defense counsel that the tapes would be of no value. None of those cases involved the combination of the three circumstances involved here.

b. Petitioner's reliance (Pet. 13-14) on the Tenth Circuit's decision in *Banks* v. *Reynolds*, 54 F.3d 1508 (1995), is also misplaced. In that case, the government argued that it had no obligation to turn over information that it had arrested two other persons for the crime with which the defendant was charged, that witnesses had identified one of those persons as being at the scene of the crime, and that the other person had allegedly confessed to the crime. *Id.* at 1510-1511. The court rejected that argument, holding that "[i]n this case, the fact that defense counsel 'knew or should have known' about the * * * information * * * is irrelevant to whether the prosecution had an obligation to disclose the information." *Id.* at 1517 (citation omitted). That case stands only for the proposition that the government may not affirmatively withhold evidence based on an argument that the defendant should have known about it. The court did not address the question whether the government satisfies its *Brady* obligations when it affirmatively extends access to the relevant material to the defendant, but does not physically deliver it to him.

The Tenth Circuit addressed that question in *United States* v. *Wolf*, 839 F.2d 1387, cert. denied, 488 U.S. 923 (1988), and reached a conclusion that is fully consistent with the decision below. In that case, the government did not physically deliver tissue samples to the defendant. But the government gave the defendant a report that listed tissue samples as having been collected during the coroner's examination and asked the defendant to contact the coroner for any physical evidence needed for trial. In those circumstances, the Tenth Circuit held that the government had not suppressed the tissue samples in violation of *Brady*. The court explained that "[i]f the means of obtaining the exculpatory evidence has

been provided to the defense, * * * a *Brady* claim fails, even if the prosecution does not physically deliver the evidence requested." *Id.* at 1391.[3]

c. The D.C. Circuit decisions upon which petitioner relies (Pet. 14-15) are also inapposite here. In *In re Sealed Case No. 99-3096* (*Brady Obligations*), 185 F.3d 887 (D.C. Cir. 1999), the government argued that it had no duty to disclose a witness's cooperation agreements with local police because the defendant could have learned of those agreements by issuing a subpoena to the officers involved. The court rejected that argument on the ground that the officers were members of the prosecution team, and the appropriate way for defense counsel to obtain information from the prosecution team is to make a *Brady* request. *Id.* at 897. In *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966), the court held that the government had a duty to disclose an exculpatory statement from a bank officer, regardless of whether a diligent defense counsel could have discovered the same information himself. Neither of those decisions suggests that the government fails to satisfy *Brady* when, as here, it affirmatively makes the material at issue available to the defense and the material at issue consists of the defendant's own documents.

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[3] The other Tenth Circuit decisions cited by petitioner (Pet. 14) did not address the question presented here. In *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999), cert. denied, 529 U.S. 1029 (2000), the court held that the defendant's independent knowledge of evidence that the government withheld demonstrated the absence of prejudice. In *Smith* v. *Secretary of New Mexico Department of Corrections*, 50 F.3d 801, 833 (10th Cir.), cert. denied, 516 U.S. 905 (1995), the court held that an open file policy was insufficient to satisfy the government's *Brady* obligation to disclose the existence of certain clothes when the defendant had no idea that the clothes existed.

In cases that more closely parallel the circumstances here, the D.C. Circuit has reached results consonant with the decision below. For example, in *United States* v. *Derr*, 990 F.2d 1330 (D. C. Cir. 1993), the government failed to disclose physical evidence obtained during an arrest. The court rejected the defendant's *Brady* claim on the ground that the defendant knew about the arrests and therefore of the possibility that the government had relevant physical evidence. The court explained that "*Brady* provides no refuge to defendants who have knowledge of the government's possession of possibly exculpatory information, but sit on their hands until after a guilty verdict is returned." *Id.* at 1335.

Similarly in *United States* v. *Bolden*, 514 F.2d 1301 (D.C. Cir. 1975), the government failed to disclose that it had seized blank bullets from the defendant after his arrest. The court rejected the defendant's *Brady* claim on the ground that the evidence was available to defense counsel in the government's property office where defense counsel had examined other evidence. *Id.* at 1312.

3. a. Petitioner further contends (Pet. 16-19) that the decision of the court of appeals creates a conflict with other circuits on the scope of a defendant's obligation of diligence under *Brady*. In particular, petitioner contends (Pet. 16-18) that the decision below conflicts with *McCambridge* v. *Hall*, 303 F.3d 24 (1st Cir. 2002) (en banc), and *Freeman* v. *Georgia*, 599 F.2d 65 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). According to petitioner, those decisions hold that the government necessarily violates *Brady* when it makes a misleading statement about exculpatory information. Petitioner's understanding of those decisions is mistaken.

In *McCambridge*, the en banc majority did not address that question. Instead, it assumed arguendo that

the government should have disclosed the information at issue, and concluded that there was no prejudice from the failure to disclose. 303 F.3d at 37. Petitioner's discussion of the case (Pet. 17) is drawn entirely from the dissent, and even the dissent did not suggest that a misstatement by the government about the nature of the material at issue would result in a *Brady* violation in circumstances like those presented here. 303 F.3d at 48 (noting that "[t]his was not a case where the defense simply refused to look for evidence it knew existed").

In *Freeman*, a police officer deliberately concealed from the defense an eyewitness who possessed exculpatory information. The Fifth Circuit rejected the government's argument that its concealment of the witness did not violate due process because the defendant failed to look for the witness. The court reasoned that the government had misled the defendant into believing that the witness would give unfavorable testimony, and the defendant could not have located the witness in any event. 599 F.2d at 71-72. Nothing in *Freeman* suggests that the government violates *Brady* when it affirmatively makes the material at issue available to the defendant, that material consists of the defendant's own records, and the defendant has not relied on the government's statements about the relevance of the material.

b. Nor is petitioner assisted (Pet. 18-19) by *United States* v. *Payne*, 63 F.3d 1200 (2d Cir. 1995), cert. denied, 516 U.S. 1165 (1996), or *United States* v. *Ellis*, 121 F.3d 908 (4th Cir. 1997), cert. denied, 522 U.S. 1068 (1998). In *Payne*, the court rejected the government's argument that its failure to turn over an exculpatory document did not violate *Brady* because the defendant could have found the affidavit in a public file. The court explained that the defendant's counsel was not aware of

any facts that would have required him to discover the affidavit. 63 F.3d at 1209. The court added that the government had provided the defendant with other similar documents and defense counsel could reasonably assume that court files did not include other exculpatory material. *Ibid.*

This case is different in every relevant respect. The government did not expect petitioner to search for unspecified documents contained in a public file; it extended petitioner the opportunity to review the specific documents at issue. Nor was petitioner unaware of the possible relevance of the material at issue; they were his own documents. And while the government supplied petitioner with some documents from the warehouse, petitioner did not assume that other exculpatory information did not exist. To the contrary, he repeatedly insisted that only he could determine that.

In *Ellis*, the court rejected the government's argument that it was excused from turning over FBI 302 reports that contained exculpatory evidence because the defendant failed to exercise due diligence in requesting the documents. The court explained that the defendant had obtained a court order directing the government to produce all *Brady* material, the government turned over some FBI 302 reports, but not the reports at issue, and that the government assured the defendant that it had turned over all exculpatory information. 121 F.3d at 914.

This case is entirely different. *Ellis* concerned reports to which only the government had access; in this case, the government offered petitioner access to the documents at issue. In *Ellis*, the defendant had no reason to know about the other 302 reports. Here, petitioner had reason to know about the possible relevance

of the remaining warehouse documents. In *Ellis*, the defendant reasonably relied on the government's assurance that there were no other exculpatory 302 reports. Here, petitioner did not rely on the government's statements that there were no other relevant documents.

c. Petitioner's reliance (Pet. 19) on *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001), and *United States* v. *Kelly*, 35 F.3d 929 (4th Cir. 1994), is also misplaced. In *Leka*, the government failed to disclose the name of a police witness who possessed exculpatory information until the eve of trial. The court held that the government's disclosure was "too little, too late," because the defendant had no basis for knowing about the witness before it began pretrial preparations and a defendant does not have sufficient time for investigation once trial begins. 257 F.3d at 100. In *Kelly*, the court held that the government's failure to disclose exculpatory material could not be excused based on defendant's failure to find the information from an alternative source, because the defendant could not have found the information in time to use it at trial. 35 F.3d at 937. In this case, by contrast, petitioner had the opportunity to review the documents at issue 21 months before trial.

4. Finally, petitioner errs in contending (Pet. 20-28) that the decision below conflicts with *Strickler* v. *Green*, 527 U.S. 263 (1999), and *Banks* v. *Dretke*, 540 U.S. 668 (2004). In both *Strickler* and *Banks*, the prosecution represented that it had made all exculpatory information available through "open file" discovery, when, in fact, the relevant documents were not included. In both cases, the Court concluded that the defendant was entitled to rely on the representation that all *Brady* material has been disclosed without further efforts to obtain

the material. *Strickler*, 527 U.S. at 283 n.23; *Banks*, 540 U.S. at 693-694.

Here, in contrast, the government's "open files" contained the alleged *Brady* material, but petitioner never took advantage of the opportunity to review those files. Moreover, unlike the defendants in *Strickler* and *Banks*, petitioner did not rely on the government's representations about the nature of the documents. Indeed, the court of appeals characterized as "fanciful" petitioner's claim of reliance, because he sought and obtained continuances to review the documents after the government made the statements. Pet. App. 26a.[4]

As petitioner notes (Pet. 24), the court of appeals further distinguished *Strickler* and *Banks* on the ground that the government acted in good faith in this case. The court of appeals ultimately recognized, however, that the resolution of the question presented depended on whether the government had suppressed the evidence at issue, not on whether the government acted in good or bad faith. Pet. App. 17a. And for the reasons discussed, the court correctly determined that, on the facts of this case, the government did not suppress the

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[4] Petitioner challenges (Pet. 24-25 & n.8) the court of appeals' finding that there was no reliance, but that finding is amply supported by the record. See Pet. App. 25a-27a. Petitioner barely contests (Pet. 25 n.8) the court's finding that there was no reliance before petitioner convinced the district court to appoint a second trial counsel on the eve of trial. Instead, petitioner asserts (Pet. 24-25) that second trial counsel relied on the government's representations. But as the court of appeals explained, the district court appointed that counsel only on the condition that his appointment would not delay trial and there was no realistic possibility that the massive warehouse documents could have been examined during the two weeks that petitioner gave his second counsel to prepare for trial. Pet. App. 26a-27a. In any event, that fact-bound question does not warrant review.

evidence. Instead, it made the evidence available, satisfying its obligation under *Brady*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

Leonard A. Pelullo,
Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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REPLY BRIEF FOR THE PETITIONER

There is no dispute that prosecutors grossly misrepresented to the district court and to petitioner the availability of an array of material subject to disclosure under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district judge "recall[ed] *time and time again*, [the government] assuring the defense and me that you had gotten all the relevant documents from the Florida warehouse." C.A. J.A. 3930 (emphasis added). There is also no dispute that the documents were so central to the case and the credibility of the government's witnesses that a retrial was required. The district court found that the "mass of documentary and other evidence" in question "seriously undermine[d] the testimony of a number of the Government witnesses," requiring a retrial. *Id.* 3998. The Third Circuit nonetheless held that prosecutors were free to flout their profound duty to represent honestly the state of the disclosures required by *Brady* (see, *e.g.*, *Banks* v. *Dretke*, 540 U.S. 668, 693-98 (2004); *Strickler* v. *Greene*, 527 U.S. 263, 283-84 & n.23 (1999)) so long as the defendant could have uncovered the truth through a diligent investigation, "even when there might be some showing of governmental impropriety." Pet. App. 29a. That holding conflicts with decisions of this Court and other court of appeals and warrants certiorari.[1]

I. The Questions Presented Merit Certiorari.

1. The government's brief in opposition is most notable for the fact that it does not deny that the questions presented

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[1] This Court's decisions cannot be distinguished on the ground that "the government's 'open files' contained the alleged *Brady* material, but petitioner never took advantage of the opportunity to review those files." Contra BIO 19. The government cannot seriously argue that it violates due process to falsely state that an open file contains *everything* relevant (as in *Strickler* and *Banks*) but that it comports with the Constitution to falsely state that the open file contains *nothing* relevant (as in this case).

by the petition are the subject of square and recurring circuit conflicts. The Third Circuit's holding that a *Brady* violation is excused if the defendant fails to exercise "due diligence" (Pet. App. 4a) is directly contrary to decisions of other circuits (see Pet. 12-16). The government's brief below recognized the conflict. See *id.* 11 (citing Gov't C.A. Reply Br. 31 n.27). Indeed, this Court granted certiorari to resolve the conflict in *Strickler* v. *Green*, 527 U.S. 263 (1999), but ultimately did not decide the issue. See Pet. 11. The conflict arises from entire bodies of settled case law in other circuits. See *id.* 12-13 (four Ninth Circuit decisions), 13-14 (four Tenth Circuit decisions). In addition, even circuits that generally apply a due diligence exception to *Brady* nonetheless refuse to do so when, as in this case, (a) the government misleads the defendant about the availability of evidence (*id.* 16-18), (b) prosecutors make limited disclosures that create the impression that disclosure has been complete (*id.* 18-19), or (c) the evidence only becomes relevant at trial (*id.* 19).[2]

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[2] In addition to the cases cited in the petition, the Eleventh Circuit has recently made clear that its due diligence exception applies only when the government makes "no false or misleading statements regarding what that evidence might show or where it might be found." *Maharaj* v. *Secretary, Dep't of Corr.*, 2005 U.S. App. LEXIS 27418, at *51 (CA11 Dec. 15, 2005) (citing *Banks*, *supra*).

The cases cited by the government as supposedly "more closely resembl[ing] the circumstances here" (BIO 11) are easily distinguished. The very fact that the government claims that these precedents are the most analogous decisions supporting the Third Circuit's extreme position is itself a strong testament to how insupportable that position is. Among other things, none of those decisions – in contrast to those cited by the petition – involves the most critical fact of this case: false statements by prosecutors about whether the government has made a full disclosure under *Brady*. In *United States* v. *Shelton*, 588 F.2d 1242 (CA9 1978), cert. denied, 442 U.S. 909 (1979) (BIO 11-12), the government was unable to locate a report of a witness interview that it had been ordered to

The government also does not dispute the significance of the issue, which is outcome determinative in numerous cases.[3] It is also central to the orderly functioning of the criminal justice system. This Court has repeatedly recognized "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281. District courts and defendants constantly rely on the government's representation that "it is unaware of any *Brady* material in this case, that it is aware of its continuing obligations under *Brady* and that, if such material is discovered in the future, it will provide timely disclosure of that material" (*e.g.*, *United States* v. *Watts*, 2005 U.S. Dist. LEXIS 24638, at *13-*14 (S.D.N.Y. Oct. 21, 2005)) to allow the defendant to allocate scarce resources in developing his defense without bombarding the

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disclose; the court found no *Brady* violation because the government as a substitute ensured that the defendant could contact the witness. *United States* v. *Wolf*, 839 F.2d 1387, cert. denied, 488 U.S. 923 (1988) (BIO 13-14), similarly held that the government complied with *Brady* when it provided a report on evidence and offered to make the evidence available. In *United States* v. *Derr*, 990 F.2d 1330 (CADC 1993) (BIO 15), the critical fact for the court of appeals – which the government neglects to mention – is that the defendant *did not* request the disclosure. *United States* v. *Bolden*, 514 F.2d 1301 (CADC 1975) (BIO 15), found as a matter of fact that there was no prejudice from the failure to disclose evidence; indeed, the defendant's lawyer had not claimed otherwise.

[3] For examples subsequent to the filing of the petition for certiorari, compare *Atkins* v. *County of Riverside*, 2005 U.S. App. LEXIS 19928, at *6 n.2 (CA9 Sept. 14, 2005) ("reject[ing]" the government's "argument that mere access on the part of the defendant" to the evidence in question "absolved the government of any *Brady* duty of disclosure" because the defendant was entitled to rely on the government's representations (citing *Gantt* v. *Roe*, 389 F.3d 908 (CA9 2004)) with *Ienco* v. *Angarone*, 429 F.3d 680, 2005 U.S. App. LEXIS 24467, at *7 (CA7 Nov. 14, 2005), and *LeCroy* v. *Secretary, Fla. Dep't of Corr.*, 421 F.3d 1237, 1268 (CA11 2005).

government and the court with repeated demands for disclosure. The decision below calls that consistent practice squarely into question and, if allowed to stand, would have a substantial adverse effect upon federal criminal practice. See Pet. 21-22.[4]

II. The Government's Arguments Lack Merit.

A. This Court Would Resolve The Conflict Over A Due Diligence Exception To *Brady* In This Case.

The government's principal argument, at bottom, is that this is not an appropriate vehicle for resolving the questions presented. That argument is unfounded. If this Court granted certiorari, it plainly would resolve the circuit conflict over whether there is a due diligence exception to *Brady*. The legal question was not only presented and decided by the Third Circuit, but it was the premise of the court of appeals' legal conclusion that petitioner had a "due diligence" obligation to investigate the Florida documents himself. See Pet. 8; Pet. App. 4a, 22a n.13, 24a, 27a, 28a, 30a, 35a n.24. It is true that the court went on to examine the underlying facts of this case, as must every court deciding a *Brady* challenge. But those factual determinations have no bearing on whether the Third Circuit's legal construction of the *Brady* obligation was cor-

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[4] The government describes the petition as supposedly presenting the question whether "the government [was required to] physically deliver the [*Brady*] material to petitioner" (BIO i) and begins its argument by asserting that "[p]etitioner contends (Pet. 9-20) that the government violated *Brady* by failing to deliver to petitioner all of the warehouse documents that were relevant to his defense" (BIO 9). See also *id.* 13 (attempting to distinguish conflict with *Banks* v. *Dretke*, 54 F.3d 1508 (CA10 1995), on the sole ground that *Banks* did not involve a claim that the government did "not physically deliver [the *Brady*] material"). Petitioner obviously does not claim that the government is required to "physically deliver" documents; rather, the government may not lie about whether it possesses documents the defendant is entitled to inspect.

rect. For example, absent a "due diligence" exception, it was the government's duty to disclose the documents, and it makes no difference whether the government is correct that petitioner did not rely on the prosecutors' false statements.

In addition, the government's claimed factual distinctions do not apply to a critical piece of exculpatory evidence that the district court found material. As the petition explained, the government failed to disclose a significant handwriting report, which the district court found "was a pretty persuasive piece of evidence" (C.A. J.A. 3936) that "would have cast doubt upon important testimony of a key witness" (Pet. App. 67a) and in fact "tend[ed] to show that [the witness] lied at trial" (*id.* 66a). None of the government's objections to the case as a vehicle for deciding the basic "due diligence" question apply to this central piece of evidence. The report was not created by petitioner or his companies; it was not among the Florida files; and it was not a document that the government purportedly had offered to disclose to petitioner. The prosecutor did not provide the report to petitioner notwithstanding that he "was aware of" it. C.A. J.A. 3937. As the government frankly acknowledged in its brief below, the *only* basis on which the government's failure to disclose the document can be sustained is the Third Circuit's settled rule – which other circuits reject – that petitioner had a "due diligence" obligation to uncover the document himself through other litigation. Pet. 28 n.9 (quoting Gov't C.A. Br. 65-66).

B. The Government's False Statements On The Eve Of Trial Could Only Be Excused On A "Due Diligence" Theory.

The government's vehicle arguments also lack merit because they do not respond to petitioner's central claim that the government violated *Brady* through its false statements on the eve of trial. As explained in the petition (at 4, 5-7), the government's trial strategy was to focus on particular transactions relating to Compton Press that underlay the supposed "three embezzlement schemes" (BIO 2), alleging that each was in-

fected with fraud. The transactions were not identified in the indictment, however. As a consequence, at the time of the trial, only the government – not petitioner – knew the false trial testimony the government's witnesses would offer, and petitioner had no way of knowing what types of documents would impeach that testimony. For example, the government does not dispute that its witnesses offered flatly false testimony about whether petitioner had provided a particular "bridge loan" and whether a particular meeting had occurred. See Pet. 5-6. Prior to trial, even if petitioner had reviewed the Florida documents in detail, it would have been absolutely impossible for him to predict the witnesses' testimony and secure the relevant documents demonstrating that the testimony was false. Indeed, the brief in opposition does not contend otherwise.

It is thus dispositive that, on the eve of trial, prosecutors stated that they had been "assured" that there were "no documents" in Florida that were relevant and that petitioner's counsel "*should not bother to go* to Jacksonville." Pet. App. 15a (emphasis added). Prosecutors then assured the court and petitioner that they were conducting "an exhaustive search" (C.A. J.A. 385) and subsequently confirmed that "[t]he United States is not aware of any additional * * * *Brady* or *Giglio* material" (*id.* 4040-41). See Pet. 3. The government thus now admits that, on the eve of trial, prosecutors responded to a statement by petitioner's counsel that he sought to review the documents by stating "that the Florida prosecutor had assured [them] that there were *no documents* in Florida pertaining to Compton Press or to the charges against petitioner." BIO 6-7 (emphasis added). The government moreover "confirm[ed] that it had provided *all materials* subject to disclosure." *Id.* 7 (emphasis added). Such gross misrepresentations – which, the district court found, caused the jury not to hear significant evidence that required a new trial – go to the heart of the *Brady* obligation.

The government's only response to petitioner's constitutional claim is to repeat the court of appeals' conclusory

statement that, as of the time the trial commenced, it would have been too late to review the documents. The theory is that, although the district court found that petitioner's counsel "relied on the government's representation, [there could be no] genuine reliance because petitioner's second counsel could not have examined the documents in the brief period between the time he was appointed and the time of trial." BIO 9. But the government's use of the term "genuine reliance" is of course completely inapt, for its point has nothing to do with "reliance" and everything to do with the assertion that, although petitioner's counsel did rely, it would have been too late to review the evidence if the government (contrary to its practice throughout the case) had actually told the truth. In fact, petitioner's trial counsel submitted an uncontradicted, sworn affidavit – credited by the district court – that were it not for the government's false representations, once the government put on its testimony he would have arranged for someone to review the Florida documents for impeaching and exonerating evidence. In turn, the government acknowledges that the district court – *the same judge who tried the case* – found as a matter of fact "that the petitioner and his counsel reasonably relied on the government's representations that there were no relevant documents in the Florida warehouse." BIO 8. The Third Circuit itself emphasized "the ease" with which petitioner's counsel located the documents immediately after trial (Pet. App. 28a), and they would have been uncovered with the very same "ease" during the trial because the body of documents responsive to the testimony was quite small. There is no basis for overturning the trial court's findings of reliance and prejudice, which manifestly are not "clear error."

The Third Circuit's holding moreover gives rise to a significant legal conflict with decisions of this Court and other circuits, which hold that the government has ongoing *Brady* and *Giglio* obligations during trial and through sentencing. See Pet. 26. *Banks* itself involved the government's *Brady* representations "on the eve of trial." 540 U.S. at 693. The

Third Circuit's decision as a practical matter nullifies those obligations, as it pointed to nothing remarkable about this case that made defense counsel uniquely unable to review the limited universe of materials that became relevant during the trial proceedings.

This case accordingly squarely presents the circuit conflict over whether there is a "due diligence" exception to *Brady*.[5]

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[5] With respect to the period *prior* to its representations on the eve of trial, the government emphasizes that petitioner indicated a desire to review the documents. BIO 4. The district court properly found that this claim "ignores the reality of the situation." Pet. App. 59a. The government acknowledges – as it must – that petitioner subsequently instead asked the government to disclose all exculpatory evidence from the Florida warehouse and that prosecutors represented – falsely – that the six boxes previously disclosed "represent[ed] *all*" of the relevant documents from Florida. *Id.* 5. Petitioner's determination not to pursue the matter further in light of the government's representations was perfectly reasonable. The burden manifestly was not on petitioner given the prosecutors' statements: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695. This Court has thus firmly rejected the assertion that "the prosecutor can lie and conceal and the prisoner still has the burden to * * * discover the evidence." *Id.* at 696 (alteration in original).

In addition, the government acknowledges that the most that petitioner indicated was that he "needed to review the documents to identify those pertinent to the defense case" (BIO 4 (Dec. 1994)) and to identify "what he would need to defend himself" (*id.* 5 (Mar. 1995)). That is a very different matter from reviewing the Florida documents to uncover evidence that impeached the testimony of the government's witnesses, of which petitioner was of course unaware before trial. See Part II-B, *supra*.

The government finally states that petitioner "asked for a continuance of several months to obtain the documents and review them." BIO 5-6. That assertion is contrary to the record and sub-

C. The Government's Remaining Arguments Lack Merit.

The remaining factual distinctions raised by the government were addressed by the petition. Beyond its claim that petitioner did not rely on the government's false statements that the Florida documents it withheld did not contain any *Brady* materials (addressed in Part II-B, *supra*), the government describes the Florida warehouse as containing petitioner's "own" documents (BIO 10). But that is quite misleading, insofar as the government is suggesting either that its *Brady* obligations are reduced when it withholds the defendant's own documents or that petitioner should have known their contents. The fact that "petitioner knew about *the nature* of the warehouse documents" in the sense that he knew that some related to Compton Press (*id.* 10 (emphasis added)) does not diminish the government's obligations under *Brady*. The irreducible logic of the government's contrary position is that whenever a defendant is aware of the general contours of available materials possessed by the prosecution – to take a simple and recurring example, witness interview reports – the government has a license to lie about their contents. As the opposition admits, these were not petitioner's *personal* documents, but "business records of 25 of petitioner's companies" (*id.* 3), which employed thousands of employees. The government's assertion is akin to the implausible claim that it does not violate *Brady* if it seizes, withholds, and lies about the corporate files of a massive consulting company. *Cf. Ar-*

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stantially misleading. The district court properly recognized that for most of this period petitioner "was in jail and obviously could not have made his own examination." Pet. App. 60a. The most that even the court of appeals said is that petitioner sought a continuance for *several* reasons, one of which was to review documents, see *id.* 13a, and the record moreover does not establish that the documents included those in the Florida warehouse, see C.A. J.A. 3838-39, 3845-46.

thur Andersen LLP v. *United States*, No. 04-368 (May 31, 2005) (slip op.).

Finally, the government notes that the documents in question were voluminous. That is correct, but irrelevant. Petitioner's argument is not that the government was required to search the Florida warehouse to uncover exculpatory materials, but instead that it could not mislead petitioner into believing it had done so. Thus, the government quotes the district court's statement that "[n]o one but [petitioner] could comprehend [the body of documents] in its entirety" (BIO 3), apparently to create the misimpression that petitioner should have known about the particular exculpatory documents now in question. But the district court, of course, found precisely the opposite: "Defendant was in jail and obviously could not have made his own examination; it would be *fanciful* to expect that he would remember in detail the contents of an enormous body of documents assembled in a warehouse." Pet. App. 60a (emphasis added).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for a writ of certiorari, certiorari should be granted.

Respectfully submitted,

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